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IN THE

Supreme Court of the United States

October Term, 1938.

No. 7, ORIGINAL.

THE STATE OF TEXAS,

Complainant,

against

THE STATE OF FLORIDA, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF NEW YORK, MABEL HARLOW GREEN and HETTY SYLVIA ANN HOWLAND GREEN WILKS,

Respondents.

BRIEF FOR RESPONDENT, THE STATE OF NEW YORK, IN SUPPORT OF ITS EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 11, ORIGINAL.

THE STATE OF TEXAS,
Complainant,
against
THE STATE OF FLORIDA, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF NEW YORK, MABEL HARLOW GREEN and HETTY SYLVIA ANN HOWLAND GREEN WILKS,
Respondents.

BRIEF FOR RESPONDENT, THE STATE OF NEW YORK, IN SUPPORT OF ITS EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER.

Jurisdiction of the Court.

The Respondent, The State of New York, has not excepted to any of the jurisdictional facts found by the Special Master at pages 10 to 15 of his Report. In its answer, prayer is made that this Court deter-

mine and adjudge whether Edward H. R. Green, deceased, was domiciled at the time of his death in the State of Florida, or in the State of Texas, or in the Commonwealth of Massachusetts, or in the State of New York.

If this Court has jurisdiction, it is conferred by Section 2 of Article III of the Constitution of the United States.

The State of New York opposed the filing of the Bill of Complaint herein and is still of the opinion that this Court is without jurisdiction, as it is convinced that no controversy among States exists. Assuming that this Court would have jurisdiction, in the event all four States assessed and levied taxes upon the estate on a domiciliary basis and the aggregate of such taxes, together with the taxes imposed by the United States, exceeded the value of the net estate, the fact still remains that this condition does not, as yet, exist, and it is unlikely that it ever would, for it would require a determination by the appropriate authorities of each of the States that Green was domiciled therein at the time of his death. As yet, no one of the States has assessed and levied any death tax against the estate, and, if the matter were left to the ordinary procedure for the assessment of such taxes in the various States, it is highly improbable that determinations would be made in all of the States that Green was domiciled therein. In New York State, the only administrative official who has authority to determine whether or not the estate tax is assessable on the theory that Green was a resident of the State is the Surrogate of one of the counties and thus far no Surrogate has acted in this respect.

It is extremely doubtful if this case will be of any considerable value as a precedent, owing to the fact that the situation it presents is unique and the expense involved in a proceeding such as this is tremendous. Furthermore there is little to commend the litigious method of determining tax liability. Far better results will be obtained for both the States and the estate if the normal processes of tax assessment are adhered to.

For the Courts of the United States to step in and undertake to determine State tax questions through litigation before the ordinary procedure of the States has been resorted to would seem to constitute an unwarranted invasion of the rights of the States quite beyond the limitations upon the exercise of federal power set forth in the Constitution of the United States.

Statement.

From the standpoint of the Respondent, The State of New York, the only questions presented by this case are:

(a) Whether Green ever became domiciled in the State of New York, and, if so,

(b) Whether he ever lost such domicile.

Such references to the Report of the Special Master, the Digest of the Evidence, and the Official Transcript of the Record as are deemed necessary and appropriate are made in the course of the argument

under the several points herein or in the Bill of Exceptions to the Report of the Special Master.

The Report of the Special Master.

The Respondent, the State of New York, has filed herein its Exceptions to the Report of the Special Master, which are seventy-seven in number. It is intended to urge each error assigned, but, as the majority of the exceptions relate to evidential matters and the Bill of Exceptions contains citations to those portions of the Report of the Special Master, the Digest and the Official Transcript which are deemed to support them, argument with respect to the exceptions is, in many instances, unnecessary.

Aside from the exceptions, the criticism to be made of the Report of the Special Master is that it is written more from the standpoint of the Advocate than from that of the Judge, a fault which is not uncommon when a person's experience has been in the field of practice of the law and not in judicial office. Without going into detail, it may be pointed out that the Report includes findings of many evidentiary facts, at the same time omitting other evidentiary facts deemed of importance to this Respondent, that it uses certain facts to establish that the domicile of the decedent was not in the State of New York or the State of Florida, but fails to make like use of similar facts with respect to the Commonwealth of Massachusetts, and that the findings are arranged in such manner and the Report so worded as to improperly color it in favor of the Respondent, The Commonwealth of Massachusetts, and against the other Respondents and the Com-

plainant. The determination is not warranted by the evidence and contrary to the controlling principles of law applicable to this case.

The Digest of the Evidence.

On the whole, the Digest of the Evidence is a fair abbreviation of the Official Transcript of the Record, but contains many inaccuracies and important omissions. The digester should not essay the role of editor, and, even though it may be his conception that certain testimony or other evidence is unimportant, it should not be eliminated. Particular instances in which the Respondent, The State of New York, feels that reference should be made to the Official Transcript of the Record have been pointed out in its Bill of Exceptions or will be indicated in this brief, but attention is called to the fact that in many instances the Digest omits important portions of the evidence, *e. g.*, the treatment of N. Y. Ex. 95, which appears at pages 4393-4 of the Official Transcript. The Digest states with respect to this exhibit (p. 178):

> "N. Y. Ex. No. 95, letter from Green dated January 24, 1913, to Dr. E. P. Wilmot, Austin, Texas, explaining the pressure of business in New York prevented him from attending the Governor's Inaugural Ceremonies (4393)."

The reason this exhibit was offered by New York was that it contained the following statement:

> "As I have moved to New York and located so far away from Austin it will be impossible for me to attend this meeting."

All reference to this quotation from the letter, which is deemed very important by New York, was omitted from the Digest.

Another example is found at page 204 of the Digest, where the entry is:

> "Ex. No. 38, excerpts from the Minute Books of the Murray Company, of Dallas, Texas, pertaining to the original appointment of Green as a Director and his election in subsequent years, covering the period from October 20, 1909 to February 18, 1936 (4908-28), indicating in the Minutes of the meeting January 13, 1931, that E. R. H. Green and Walter P. Allen were residents of Terrell, Texas; no designation of residence being given in subsequent years."

The reference in the Digest fails to show facts set forth in the exhibit deemed of material importance to New York, viz., that in January, 1910, and January, 1911, Green was shown to have resided in Dallas, Texas, but in January, 1912, and January, 1913, he was shown to be a resident of the City of New York, which indicates what those responsible for the records of the Company understood to be his residence in those years. The fact that in subsequent years he was shown to be a resident of Terrell, Texas, is easily accounted for. He had then established his theoretical domicile in Terrell and was embracing every opportunity to build up evidence to support it.

New York feels that the only way in which all the evidence in the case may be obtained in its true perspective is by consulting the Official Transcript. Time available to Counsel has not been sufficient to permit a studied comparison of the Digest with the Transcript for the purpose of noting inaccuracies and omissions, but the foregoing are illustrative of the reason why it is believed that the Digest in many instances does not present a fair resume of the evidence.

POINT I.

Green abandoned his domicile in Texas in 1911 and became domiciled in New York.

Green was in New York City with his parents at the time he attained young manhood. He attended Fordham University for a while and was then sent by his mother to Chicago to acquire some business experience in looking after her investments there. In the year 1892, after his return from Chicago to New York City, his mother sent him to Terrell, Texas, to look after her investment in the Texas Midland Railroad, which Railroad she had acquired as the result of a mortgage foreclosure. His life in Texas is fairly stated in the Report of the Special Master at pages 23 to 27. He first lived at Terrell, but after a few years there moved to Dallas, where he occupied rented quarters until in 1907 or 1908, he purchased a substantial residential building there, which he had remodeled and elaborately decorated to suit his taste, and into which he then moved. This house was well furnished and equipped and was a home in every respect. He lived in it until the early part of 1911, when his mother indicated her desire that he should return to New York City to assist her with her business affairs. Before leaving Texas, he disposed of most of his business interests there and gave up the office of General Manager of the Railroad, although he retained the presidency. Until 1911, he had been assessed for personal property in Dallas as a resident, but was not so assessed thereafter.

In July, 1911, he gave up his residence in Dallas and shipped his automobiles and household furniture to New York City.

The Special Master states at page 51 of his report:

> "The undisputed facts clearly show, as this admission of counsel indicates, that after 1911 Green *no longer had a place of residence in Texas.* The domicile of choice which he established in Texas in 1892 and maintained until 1911 was abandoned in fact and his domestic establishment and all of his personal belongings removed to New York." (The italics are from the Report.)

The Record is pregnant with evidence to support the statement quoted above. It is beyond dispute that when Green left Texas in 1911 he not only had no place of residence there but definitely abandoned his domicile of choice there. His domestic establishment and personal belongings were all removed to New York City and Miss Harlow, who had been his housekeeper in Texas, came to New York to occupy a similar capacity there.

Upon his arrival in New York City, Green set up his domestic establishment and installed his household furniture and personal belongings in a four story, one family, brownstone front residence located on West Ninetieth Street, just around the corner from Central Park, West. This residence belonged to the estate of his grandfather and was under the control of his mother. It was serviced by an adequate number of domestics and had all the indicia of a home, being comparable in every respect with the home which he had abandoned in Dallas. He lived in the West Ninetieth Street house until 1918, when he moved to the Waldorf-Astoria Hotel, which was then the most sumptuously appointed hotel in New York City. There

he occupied a large suite of rooms, which he retained continuously until the hotel was torn down in 1929.

In July, 1917, while living in the West Ninetieth Street house, he was married to Miss Harlow and she went to live with him at the Waldorf-Astoria as his wife. Shortly after moving into the Waldorf, the Greens took Mrs. Mary Stafford, a friend of their Texas days, into their family circle and she continued to live there with them until 1927.

From the time he came to New York to live until he was physically disabled in 1921, Green led the normal life of a New York City business man, attending to his business affairs and patronizing the baseball games and theatres.

He maintained an office for the transaction of his business affairs.

He kept two or more luxurious automobiles, manned by chauffeurs and ready for service whenever needed.

He became a director in some of the leading banking institutions, maintained his bank accounts and safe deposit vaults in said City and kept his securities there.

He became affiliated with many clubs and societies, social, scientific, business and recreational in their natures.

When he left the City on business trips, or for other reasons, he always returned.

The foregoing is but a brief outline of Green's activities in New York City from 1911 to 1921. His life there was lived in exactly the same manner as he had lived in Texas.

In spite of the aforesaid facts and his definite finding that Green abandoned his domicile of choice in Texas in 1911, the Special Master indulges in the wholly unwarranted presumption that he intended to return to Texas (R. 51), and failed to find that he ever became domiciled in New York.

Matter of Trowbridge, 266 N. Y. 283, is ample authority for the proposition that Green became domiciled in New York.

New York in its Exceptions, numbered 2, 3, 4 and 5, has duly presented to this Court the failure of the Special Master to find the facts in relation to Green's whereabouts during the period above referred to, his failure to find that before moving to New York City from Texas in 1911 Green disposed of practically all of his business interests in Texas, his failure to find that when Green left Texas in 1911 and moved to New York City he intended to and did leave Texas permanently, and his failure to find that Green became domiciled in the State of New York after he moved to said State from Texas in the year 1911.

The fact that Green rented a room in Terrell, Texas, at about the time he came to New York, with the purpose of establishing a voting residence there, does not militate against his acquisition of a New York domicile. The room was palpably a pretext. He never

entered it and kept nothing there, except a few pieces of discarded clothing.

Although the Special Master in his Report erroneously states that Green relinquished the room above referred to after his mother's death in 1916 and his marriage in 1917, the fact is that he relinquished the room in 1914, two years before his mother's death and three years before his marriage. This is covered by New York's Exception No. 59.

Green's attempt to preserve his domicile or legal residence in Texas by the renting of a room in Terrell was clearly abortive.

Matter of Steer, 3 H. & N. 594.
Archer v. Civil Service Commission, 1 C. 2d 357, 26 Pac. 2d 41.

The fact that Green voted in Terrell, Texas, until the year 1920 did not have the effect of continuing his Texas domicile.

In the *Trowbridge* case, 266 N. Y. 283, *supra*, it appeared that with two exceptions Trowbridge had registered and voted in New York State from 1921 until he died in 1931, but notwithstanding this he was found to have been domiciled in Connecticut. Indeed, the case for a New York domicile for Trowbridge was stronger than the case for a Texas domicile for Green, because Trowbridge not only voted in New York but he also owned a house there in which he had formerly lived, which had not been rented and could have been made available as a residence for him if he chose to live there.

See also:

People ex rel. James v. Surrogate's Court, 36 Hun, 218.

The statements contained in certain affidavits made by Green for the purpose of "swearing off" an assessment for personal property made against him by the assessors of the City of New York in the year 1916 do not form a sufficient basis upon which to predicate the continuance of a Texas domicile. These affidavits were self serving. They contained obviously false statements, as is pointed out in New York's Exception No. 13, wherein exception is taken to the Report of the Special Master for failure to make a finding with respect to such false statements. Mr. Lawson Purdy, who was then President of the Board of Taxes and Assessments of the City of New York, testified that at the time in question the whole assessment procedure in New York City with respect to personal property was asinine. It was common knowledge that taxes on personal property could be evaded, as such taxes did not find sanction in the eyes of the public. A convenient method employed to avoid such taxes was to set up a claim of non-residence in cases where there was even the slightest basis for so doing.

It should be observed that Green made statements to the taxing authorities of Massachusetts and Florida similar to those made to the New York City taxing authorities. If his statement that his legal residence was in Texas was sufficient to preclude a domicile in New York, it certainly would be sufficient to preclude a domicile in either Massachusetts or Florida.

As a matter of fact, the declarations made by Green in the affidavits submitted to the New York City taxing authorities are unimportant from a domiciliary standpoint. This appears to be conclusively established by a multiplicity of decisions.

In *Matter of Trowbridge*, 266 N. Y. 283, *supra*, Trowbridge filed a verified statement with the Connecticut taxing authorities in which he stated that he was a non-resident of that State, a declaration that he never withdrew. He went even further and requested the New York City tax authorities to transfer his name to the resident tax roll, as the result of which he was assessed as a resident of said city from 1924 to 1930, inclusive. These facts were deemed insufficient to sustain a New York domicile.

A correct statement of the principle of law which controls with respect to the maintenance by Green of the pretense of a domicile in Texas is contained in *Turner v. Turner*, 87 Vt. 65, where the Court say (p. 66):

> "It is plain under our decisions that the court below was right, for *intention* alone cannot retain a residence, every vestige of which is gone, with no place left to which the party has a right to return."

In the same case, it was said (p. 67):

> "In *Barton v. Irasburg*, 33 Vt. 159, it is said that in considering the question of *intention* it is always important to consider whether the party has anything to return to. If he has, he may well be supposed to have an intention to return. But if he has not, he may more reasonably be thought to carry his home with him."

In *Barton v. Irasburg*, 33 Vt. 159, cited in the last quotation, it was said (p. 162):

> "Again, in considering the question of intention, it is always important to consider whether the party has anything to return to.
>
> "A householder who has a family and a house to return to, a single person who has an accustomed home, or personal effects and worldly goods to go back to, may well be supposed to have the intention of returning. Hence in many cases the place where one keeps his effects, his chest, etc., is said to be his home. If he take his all with him and leaves no home behind him, then he may be thought more reasonably to carry his home with him."

In *Jamaica v. Townshend*, 19 Vt. 267, the court say (p. 270):

> "Residence is a *fact*. Here the fact and the manner of dwelling is conceded; and the court charged the jury, that, in such a case, the intention to build a house and remove into it in the town of Jamaica did not constitute a residence in Jamaica. Is there any case, where such an *intention* will constitute a *residence?* I think not. When one leaves home, or leaves a former residence, the intention to return, the *animus revertendi*, will often prolong the virtual or legal residence, or domicil, when the actual *commorancy* may be, most of the time, in another place. Such are those occasional absences, which always occur in visits of business, or pleasure, when one's family attends him. Nor is it important, whether, during these temporary absences, the family board, or keep house, or whether the absence be for a few weeks, or many months, or years, even—as occurs in the case of foreign ministers, and members of Congress, sometimes.
>
> "But in all these cases there is always some *place*, which the party does, or may justly, call *home*, some local habitation, which has a tangible, palpable existence, out of the mind of the party.

I do not say this is *always* indispensable; but there must be something more than a mental purpose of return at some indefinite, future time."

The evidence fails to establish even a floating intention on Green's part to return to Texas, but if it had been proved that such an intention existed, it would not have been sufficient to keep the Texas domicile alive.

The quotation in the Report of the Special Master, at pages 52-3, from *Gilbert v. David*, 235 U. S. 561, contains a clear statement of the law of floating intention. That case standing alone is ample authority for the propositions that Green lost his Texas domicile when he moved to New York City, and that he acquired a new domicile in the latter place.

In *Wright v. Schneider*, 32 Fed. 705, it was said (p. 706):

"For the two years preceding the filing of the bill of complaint, complainant does not appear to have maintained a residence elsewhere than in the state of Missouri.

"In opposition to the facts above recited, we have the statement of the complainant that in point of fact it was not his purpose to give up his residence in New Jersey, that his residence in this state was merely temporary, and that he has always intended to return to New Jersey when his business enterprises in this State were concluded.

"From the foregoing statement it is obvious that all of the complainant's visible acts for two years or more were indicative of an intention on his part to take up his abode in this state for a period of years. It also appears that his actual residence is in this state. These facts must prevail over any secret purpose which he may have entertained to return at some indefinite future time to New Jersey and make that state his home."

If a ten year period be substituted for the two year period set forth in the foregoing quotation, the word New York for Missouri, and the word Texas for New Jersey, the statement would come close to reflecting the situation in the case at bar.

In *Ringgold v. Barley*, 5 Md. 186, it was said (p.193):

> "When once removed to his new domicil, however, the party's purpose to remain need not be fixed and unalterable. If it becomes a place of *fixed present domicil* it will be sufficient to fix a residence, and although there may be a *floating intention to return to his former place of abode at some future period*, still these circumstances will not defeat the newly acquired residence or the rights and obligations which attach to it."

In the proceeding in the Surrogate's Court of Essex County, State of New York, for the probate of Green's will, counsel for the Respondent, Wilks, filed an elaborate brief, forty pages of which were devoted to establishing that Green became domiciled in New York City after he left Texas. In this proceeding, the same counsel have not committed themselves in this respect.

New York unreservedly adopts the following argument from the brief of counsel for Respondent, Wilks, in the aforesaid probate proceeding:

> "The essential element of a man's domicile is that it is where his home is. Beale explains that the meaning of the word 'home' as used in this definition is expressed in various ways, but the clearest statement seems to be:
>
> 'the place in which a person has a fixed habitation without any present intention of moving therefrom.' (I Beale's Conflict of Laws, p. 147.)

"Clearly enough, Colonel Green had such a home as this in New York in 1917 and had no such home as this in Texas in 1917. From the latter part of 1911 he had lived continuously in the house in West 90th Street, where he had a complete establishment and to which he had moved his furniture when in 1911 he closed and sold the only house he had in Texas.

"His general habit of life centered in New York City. He ate and slept and passed a large part of his leisure time in his home in 90th Street. He attended regularly at the office which he and his mother, Mrs. Hetty Green, maintained for the transaction of their business affairs. He went to the theatre frequently and during the season was a regular attendant at the baseball games at the Polo Grounds. He was a member of several New York clubs and organizations. He was a director throughout this period of two banks in New York City and for part of the time of a safe deposit company also. He regularly attended frequent meetings—in some instances weekly meetings—of the Boards and Executive Committees of these institutions. At his 90th Street house he had his stamp collection, which was one of his principal recreational interests and he purchased the stamps for it from local stamp dealers. When he moved into the 90th Street house Miss Harlow, who had theretofore lived with him in Texas, promptly moved there also and made it her home. During approximately six years between the establishment by Colonel Green of his home in the West 90th Street house and his marriage in June, 1917, he was absent from New York City for all purposes not more than an aggregate of 13 months. There is no basis in the testimony for an inference that at any time between 1910 and 1917, Colonel Green intended to move away from New York. His written declarations are to the effect that he intended to remain there indefinitely.

"During no part of this period did Colonel Green have any other habitation, dwelling place or place of abode, except the pretense of one in

the Jarvis house in Terrell, where until November, 1914, he had kept a suit of clothes and had paid a rental of $5 a month and to which he never went. This fictitious and never occupied—indeed, never intended to be occupied—room in Terrell, a town where he had not lived since 1895, was obviously and only temporarily an attempt to have some place which might afford some semblance of reality to a claim of 'legal residence' in Texas. Such visits as he made to Texas between 1911 and 1917 were either for the purpose of inspecting the Texas Midland Railroad which, throughout the period, he and his mother were trying to sell, or for the purpose of voting. While in Texas on these visits he slept either in the private car of the Railroad in Terrell or in transient rooms at the Adolphus Hotel in Dallas.

"Conclusive upon our case is the statement of the Court of Appeals in *Matter of Trowbridge*, where the Court was answering the question of what there was to diminish the force of facts which tended to show that Mr. Trowbridge had his home and domicile in Connecticut:

'Chiefly the declarations made to tax authorities and the periodic voting pilgrimages to the city of New York. These—and again the supporting evidence is undisputed—were all parts of an attempt to vindicate an opinion that a man may retain an abandoned home as a technical domicile in law after he has elsewhere established another abode in which he expects to live indefinitely. Doubtless that intention was entertained in good faith and from motives that are beyond criticism, but it is nonetheless irrelevant.' (266 N. Y. at p. 292.)"

New York regards the question of Green's having become domiciled within its borders as being of supreme importance. If he became domiciled in New York, under well established legal principles he never lost that domicile, and was so domiciled at the time of

his death. This will be more fully developed later on in this brief.

The true situation with respect to the acquisition by Green of a domicile in New York is stated at pages 16 and 17 of the Exceptions and Objections of the State of Texas to the Findings and Report of the Special Master, where it is said:

> "* * * substantially the same indicia which the Master employed to reach the conclusion that Green, at his death, had established permanent homes in both Massachusetts and Florida, apply with equal force to his New York residences. There is no more reason for rejecting the claims of New York, in this relation, than those of Florida and Massachusetts."

If Green did not become domiciled in New York, it is certain that he never became domiciled in any other state than that which was his domicile of origin, and there has never been even the slightest suggestion that his domicile of origin in Vermont persisted throughout his life.

It is settled that a person must have a domicile somewhere. The rule is well stated by Chief Justice Shaw in *Matter of Abington v. North Bridgewater*, 23 Pick. 170, at page 177, as follows:

> "In coming to the inquiry in each case, two considerations must be kept steadily in view, and these are:
>
> 1. That every person must have a domicil somewhere; and
>
> 2. That a man can have only one domicil, for one purpose, at one and the same time."

If, as the Special Master found, Green abandoned his domicile in Texas in 1911 and did not acquire a

domicile in Massachusetts until 1921, he must have been domiciled somewhere during the intervening period of ten years. There can be no other conclusion than that he was domiciled in New York.

In referring to the *Trowbridge* case, counsel for the Respondent, Wilks, in the probate court brief aforesaid, commented:

> "The *Trowbridge* case is the most recent one in point in the Court of Appeals on the question of domicile. It states the law which determines the domicile of Colonel Green in June and July of 1917. Whatever declarations Colonel Green may have made after he left Texas in 1911, concerning the 'legal residence' which he wished to establish in that state, the undisputed fact is that he actually lived exclusively in the house at 5 West 90th Street for over five years before the execution of the antenuptial agreement and his marriage. During all that period of time he actually had no place of residence anywhere within the State of Texas."

As before stated, the opinion of this Court in *Gilbert v. David*, 235 U. S. 561, *supra*, clearly supports New York's argument that Green became domiciled in New York. The facts of the cited cases are closely analgous to the facts of the case at bar, insofar as they have bearing upon a change of domicile from Texas to New York. Mr. Justice Day, writing for this Court, said (pp. 569-70):

> "In this case it clearly appears that for some years prior to 1890 the plaintiff lived in Menominee, in the State of Michigan. He had there a home, and exercised the ordinary duties and privileges of citizenship. In February, 1890, his uncle died in Connecticut, and the plaintiff immediately went to Danbury, in that State, where he re-

mained practically all the time until his death in 1911.

"The question is, Had he lost his domicile in Michigan and acquired one in Connecticut, so that he was at the beginning of the suit in 1904 in reality a citizen of the last-mentioned State?

"This matter of domicile has been often before this court, and was last under consideration in the case of *Williamson v. Osenton*, 232 U. S. 619, *supra*. In that case the definition of domicile, as defined by Mr. Dicey, in his book on 'Conflict of Laws', 2d ed., 111, is cited with approval. There change of domicile is said to arise where there is a change of abode and 'the absence of any present intention to not reside permanently or indefinitely in the new abode.' Or, as Judge Story puts it in his work on 'Conflict of Laws,' 7th Ed., §46, page 41, 'If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period.' 'The requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely.' *Price v. Price*, 156 Pa. St. 617, 626.

"Applying these definitions to the conduct of plaintiff, we have no doubt that the court was right in holding that he had acquired a new domicile in the State of Connecticut. He removed there with his family, and occupied a house to which he held the title. He owned other real estate in Connecticut, inherited from his uncle. He took a letter from his church in Michigan to a church in Danbury, Connecticut. For about ten years he was not back in Michigan, except for a short time, and then for a temporary purpose. The Michigan homestead and much of the furniture used there were sold upon the removal to Connecticut. For more than ten years he resided continuously with

his family in the same house in Danbury, Connecticut. While the plaintiff did not vote in Connecticut, as far as the record shows, it is in evidence that he declared to another his intention of becoming a voter there. To some witnesses he declared his purpose to reside in Connecticut. As against this testimony, it appears that he left his desk with his brother-in-law in Michigan, which he declared was for the purpose of 'holding his residence there.' To some witnesses he declared his intention to live in Michigan and expressed his preference for that State as a dwelling-place. He continued to pay membership dues to orders to which he belonged in Michigan.

"It is apparent from all the testimony that the plaintiff may have had, and probably did have, some floating intention of returning to Michigan after the determination of certain litigation and the disposition of his property in Connecticut should he succeed in disposing of it for what he considered it worth. But as we have seen, a floating intention, of that kind was not enough to prevent the new place, under the circumstances shown, from becoming his domicile. It was his place of abode which he had no present intention of changing, that is the essence of domicile."

The inference to be gathered from the statement at page 51 of the Report of the Special Master, that Green was temporarily residing in New York for the purpose of conducting his own and his mother's business, would seem to be that Green did not acquire a domicile in New York because of the fact that he came to New York City to look after his mother's business affairs. From the time he was nineteen years of age Green was engaged in looking after his mother's business, first at Chicago, later in Texas, and then in New York. This is covered by Exception No. 1. He started from New York and went to Chicago in connection with his moth-

er's business interests. He returned to New York and then went to Texas on the same mission, and then again returned to New York for a like purpose. If the fact that he was in Texas on his mother's business did not preclude him from becoming domiciled there, and New York agrees with the Special Master that it did not, it is difficult to see how the fact that he came to New York in connection with his mother's business affairs can operate to shut out a New York domicile.

New York excepts to the statement on page 51 of the Special Master's Report, which reads as follows:

> "After his mother's death in 1916, his marriage in 1917 and he had come into the full enjoyment of his fortune and was free from restraint, Green might have returned to Texas and re-established himself in an actual permanent home there. Instead of doing so, he relinquished his nominal abode which he had obtained by renting a room in the house of Mrs. Jarvis in Terrell, which he never occupied, and in the visits he made to Texas in subsequent years to attend the meetings of his Railroad Directors, to vote, or for the purpose of taking medical treatment, he stopped at hotels or at the Buie Sanitarium at Marlin."

As heretofore pointed out, the room in Texas was given up in 1914. What Green might have done after his mother's death and his marriage is purely speculative and can have no possible bearing on the issue. For the Special Master to indulge in conjecture on so important a matter is highly prejudicial to the Respondent, The State of New York. The things that Green might have done are illimitable. We are only concerned with what he did. The evidence shows that after 1917 he continued to make his home in New York

City, just as he had done since 1911. (See Exception No. 59.)

The Respondent, The State of New York, contends and respectfully urges upon this Court that the law and the facts of this case establish beyond peradventure of doubt that Green became domiciled in New York City after he abandoned his domicile in Texas and moved to said city.

POINT II.

The presumption is that the domicile established by Green in New York City continued and the burden of proving that it was changed rests upon the respondents, the Commonwealth of Massachusetts and the State of Florida.

There are no principles of the law of domicile more firmly seated than that a domicile once acquired is presumed to continue, and that the burden of proof to show a change of domicile is upon those who allege it.

In *Desmare v. United States*, 93 U. S. 605, this Court stated the rule in the following language (p. 610):

> "A domicil once existing continues until another is acquired. A person cannot be without a legal domicil somewhere. Where a change of domicil is alleged, the burden of proof rests upon the party making the allegation."

In *Mitchell v. United States*, 21 Wall. 350, this Court said (p. 353):

> "A domicile once acquired is presumed to continue until it is shown to have been changed. Somerville v. Somerville, 5 Vesey, 787; Harvard Coll. v. Gore, 5 Pickering, 370; Wharton's Conflict of Laws, §55. Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation. Crookenden v. Fuller, 1 Swabey & Tristam, 441; Hodgson v. DeBuchesne, 12 Moore's, Privy Council, 288 (1858). * * * These principles are axiomatic in the law upon the subject."

In *Matter of Newcomb*, 192 N. Y. 238, a leading case on domicile it is said (p. 250):

> "The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change."

In *Kenman on Residence and Domicile*, at pages 220-2, the author states:

> "One of the few principles upon which all the authorities seem to be in harmony is that, whenever a change of domicile is alleged the burden of proof rests upon the party asserting the change. * * * As stated in the English case of De Bonneval v. De Bonneval 'the presumption of law being that the domicile of origin subsists until a change of domicile is proved, the onus of proving the change is on the party alleging it and the onus is not discharged by merely proving residence in another place, which is not inconsistent with an intention to return to the original domicile.'"

Numerous cases in many jurisdictions are cited in support of the above text.

In *Reed's Will*, 48 Ore. 500, it was said (p. 505):

> "We are not so much concerned at this time with the correct technical definition of domicile as we are with the law regulating a change of domi-

cile when once acquired. It is shown by the evidence and admitted by the contestants that Mr. and Mrs. Reed were domiciled in Oregon from 1854 to 1892—a period of nearly 40 years—and this domicile is presumed to have continued until it is shown that a new one was established in intent and in fact, by indicating and carrying into effect an intention to abandon the Oregon domicile, and to establish another in California. Every person is assumed by the law to have one domicile and one only. And when this is shown to exist, it is presumed to continue until not only another residence and place of abode are acquired, but until there is an intention manifested and carried into execution of abandoning the original domicile and acquiring another by actual residence; and the burden of proof is upon the party who asserts the change."

In *Succession of Simmons*, 109 La. 1095, it was said (p. 1097):

"The party who seeks to avail himself of a change of domicile bears the burden of proving it. So long as any reasonable doubt remains, the presumption is that it has not been changed."

Lord Brougham in *Munro v. Munro*, 7 C. & F. 842, said (p. 891):

"* * * and I apprehend it is the rule universally that, where a domicile has been constituted, the proof of the change of domicile is thrown upon the party who disputes it, and that you must show distinctly that there has been the *animus* as well as the *factum*; that there has been a desire and intention to change the domicile, as well as the fact of leaving that place of residence, in order to alter the former domicile and to acquire a new one."

In the opinion *In re Dorrance*, 115 N. J. Eq., 268, it was said (p. 277):

"The law is thoroughly well settled and unquestioned everywhere that a man's domicile once acquired, remains until a new domicile is acquired, and that a new domicile is not acquired by moving to another residence unless he has the intention to make his home permanently in the new residence." Several authorities are cited.

See also:

Bruner v. Bunting, 15 Va. Law Reg. 514;
Dunn v. Trefry, 260 Fed. 147;
First National Bank v. Hinton, 123 La. 1018;
Caldwell v. Pollak, 91 Ala. 353;
Matter of Seymour, 107 Misc. 330;
Matter of Kane, 93 Misc. 406;
Isham v. Gibbons, 1 Bradf. 69;
Ausbacher & Co. v. DeNevue, 45 La. Ann. 988;
Walker v. Walker, 1 Mo. App. 404;
Petition of Oganesoff, 20 F. (2d) 978.

POINT III.

Green's New York domicile was never changed and he was domiciled in that State at the time of his death.

In order to ascertain the true situation with respect to Green's domicile at the time of his death, it is necessary to consult the evidence in its entirety, and all of the facts developed at the trial should be considered together. New York has sought to avoid a multitude of requests to find with respect to evidentiary matters of relative unimportance but which go to make up the composite picture. Nevertheless, it is felt that consideration should be given to each and every fact dis-

closed by the evidence, whether or not included in the Digest or the Findings, and particularly the facts set forth in the Suggested Findings of Fact submitted by the Respondent, The State of New York, to the Special Master.

In his Report, the Special Master has undertaken to divide Green's life into several parts or domiciliary periods and to apply rules of law to each period so determined upon. This is erroneous and tends toward improper conclusions. It is no more possible to divide Green's life into several parts for the purpose of determining domicile than it is to wrest a particular clause in the opinion of a court from the context and say it represents the law of the case.

There was never an instant from the time Green came to New York in 1911 until he died when he did not have a home in New York City which was fully equipped and ready for his occupancy at any time, day or night. At first we find him in the West Ninetieth Street house for a period of seven years, from 1911 to 1918; then, he moves to the Waldorf-Astoria Hotel where he remains for about eleven years; and finally, when the Waldorf-Astoria is torn down, he moves to the Sherry-Netherland Hotel and maintains his home there until the time of his death. This constitutes an unbroken chain of residences in New York City from 1911 to 1936, a period representing a quarter of a century and approximately one-half of his adult life.

The various residences occupied by Green in New York City were homes in a true sense. Many, many thousands of the residents of New York City make

their homes in hotel apartments, and the facts that Green changed his home from the West Ninetieth Street house to the Waldorf-Astoria and later to the Sherry-Netherland in no way militate against his New York domicile. It is unnecessary to speculate as to the reasons which impelled Green to make his home in hotels. The transfer to the Waldorf-Astoria occurred only a brief time after his marriage, and it may be that Mrs. Green's changed status and social ambitions influenced the decision, or that Green desired to be located nearer to his office at 111 Broadway. His office had been next door to his residence on Ninetieth Street, but after his mother died he moved it downtown. The increased expense involved in living in a hotel apartment was justified by the fact that he had come into the income of his share of his mother's estate.

Green's apartment at the Sherry-Netherland, one of the most exclusive apartment hotels in New York City, was a suite which occupied the entire twenty-fourth floor and had a large open terrace overlooking Central Park. The character and dignity of this apartment is somewhat belittled (unintentionally, of course), by the statement at page 33 of the Report of the Special Master that the Greens had no dining room at the Sherry-Netherland and Green ate at his desk or on a card table. The Record is clear that the apartment did have a dining room and there is no proof whatsoever showing that Green ate at his desk or on a card table. (See Exception No. 64.)

In *Matter of Rutherford*, 88 Misc. 414, it was said (p. 417):

"By custom of this country hotels in this city [New York] are very often the 'homes' of a large number of people who for various reasons prefer living in such public places to the burdensome occupation of private dwellings or apartments. Such preference does not deprive a person of the right to regard the hotel at which he is living as his 'home,' nor does it prevent him from acquiring a domicile here. Such a person is not a sojourner at the hotel; he lives there colloquially."

The statement above quoted seems to dispose of the assertion by the Special Master at page 33 of his Report that Green's apartments in the Waldorf-Astoria and Sherry-Netherland Hotels were used as temporary sojourning places. Green was not a sojourner at these hotels. He lived there (See Exception No. 65).

There is ample precedent to the effect that a person may acquire a domicile in a hotel.

Emery v. Emery, 218 Mass. 227, is authority for the proposition that a person may have his domicile in a hotel although he owns a substantial summer home elsewhere. Indeed, in that case the summer home had long been the domicile before the hotel domicile was acquired.

In *Matter of Martin*, 173 App. Div. 1, revsg. 94 Misc. 81, it was held that the decedent had his domicile in the Plaza Hotel in New York City, despite the fact that the hotel rooms were not occupied or paid for on a permanent basis, but were only occupied and paid for on occasions when the decedent was in the city.

In *McCord v. Rosene*, 39 Wash. 1, it was said (p. 2):

"The only fact which discriminates this case from the great number of cases deciding this point

is that the residence of this respondent was at a hotel, viz., the Butler Hotel, in the city of Seattle. But this fact, we think, cannot make any difference with the question of residence. In modern times many men establish and maintain their residences in hotels, for great periods of years, both with and without their families, and whether a man lives in a hotel or at a private dwelling, either owned by him or rented for the purpose of residence, can make no possible difference."

In *Brafman v. Brafman*, 144 Md. 413, the decedent was held to have been domiciled in Baltimore, Maryland, although during the time he was there he lived at a small hotel or with relatives.

In *Estate of Austin*, Myrick's Probate Reports [1872-9] 237, the decedent lived in a hotel in San Francisco, California, but had a summer home in San Mateo, California, which latter he used for purposes of pleasure and recreation. He spoke of both places as his home. It was held that his domicile was in San Francisco.

At pages 16-17 of his Report, the Special Master makes reference to Green's Sherry-Netherland apartment as a "non-housekeeping apartment in the Sherry-Netherland Hotel in New York City." A similar reference appears at page 33 of the Report. The language employed by the Special Master is not well calculated to convey a correct impression as to the nature of Green's apartment. Great numbers of New Yorkers live in so-called non-housekeeping apartments, but this does not mean that the apartment is not suited for a home. The evidence discloses that about sixty per

cent of the guests at the Sherry-Netherland Hotel were on a permanent basis. They occupied apartments similar to Green's, although few, if any, were as elaborate. Green's Sherry-Netherland apartment was supplied with food from the hotel kitchen, and there were no laundry facilities connected with it, but there were ample facilities for the serving of meals supplied from the hotel kitchen and the linen and other necessary service were also supplied by the hotel. The description of the apartment by the Special Master is highly inaccurate, if it is taken to indicate that the apartment was not a place suited for the permanent residence of Green and his family.

The fact that Green maintained a private unlisted telephone service in his apartments at the Waldorf-Astoria and Sherry-Netherland Hotels during all the time that he lived in them, which was in addition to the regular hotel telephone service, indicates the permanent character of his occupancy. Such service is characteristic of the homes of wealthy New York residents (See Exceptions Nos. 9 and 10).

During the entire period of his residence in New York City (with the exception of the last three years of his life, to which reference will be made elsewhere) Green continued to maintain at least two chauffeured automobiles always ready for his use. These automobiles were registered in New York. The only available applications for registration of the same set forth that Green was a resident of New York City. Exception has been taken to the failure of the Special Master to find that the automobiles kept by Green in New York City were kept on "live" storage on a year round

basis, ready for service at any time, day or night, and were used frequently (See Exception No. 11).

Green had the sole occupancy of the apartments at the Waldorf-Astoria and Sherry-Netherland Hotels. The rent at the Waldorf-Astoria ranged from $11,491.-20 to $21,422.00 per year. The rent at the Sherry-Netherland was originally $27,000.00 per year, but was reduced to $20,250.00 after the depression had caused a shrinkage in rental values. The first year that Green lived at the Waldorf-Astoria he was on a yearly basis, but thereafter the basis of his occupancy was monthly. The first two years at the Sherry-Netherland were on a yearly basis, after which his occupancy there was monthly.

From 1911 until his death, Green's principal bank accounts were kept in New York City, his safe deposit vaults were there, his securities were kept there, he had his only office there, and all of his business affairs were managed there. Only subsidiary bank accounts were maintained at New Bedford, Massachusetts, and at Miami Beach, Florida, for his convenience during the time that he spent at his summer and winter residences, respectively.

In determining domicile consideration must be given to where a person has his principal bank accounts, where he has his safe deposit vaults and keeps his securities, and where he has his office and transacts his business affairs. The fact that subsidiary bank accounts are kept at the places where a person has temporary homes, such as summer and winter residences, is evidence that such places are not the domicile.

Mitchell v. United States, 21 Wall. 350, *supra*;
Chambers v. Hathaway, 187 Cal. 104;
Reed's Will, 48 Ore. 500, *supra*;
Huntly v. Gaskell, 1906 A. C. 56;
Matter of Lydig, 191 App. Div. 117;
Doeme v. Doeme, 96 App. Div. 284;
In re. Dorrance, 115 N. J. Eq. 268, *supra*;
Matter of Wolf, 144 Misc. 256;
Matter of Frick, 116 Misc. 488.

Matter of Wolf refers both to the keeping of securities in a safe deposit box and the maintenance of a principal bank account. In the opinion, Surrogate Foley said (p. 258):

> "It is significant also as bearing upon her intention that almost all of the decedent's personal property, of the value of approximately $72,000, consisting mostly of securities, was continuously located to the date of her death in Oil City, Penn."

In *Chambers v. Hathaway* it was held that the place where a person had his business headquarters, kept his safe deposit boxes in which were stored his stocks and bonds and other valuable papers, did his principal banking and made his investments, and in which he also had a permanent place of abode, was his domicile, despite the fact that he lived elsewhere during the greater portion of each year and had a bank account at the place where he spent most of his time to cover his expenses there and had a safe deposit box there where he kept such papers as he desired to have with him while he was away from his main place of business.

The other cases cited support the statements contained in the text.

When Green first came to New York City in 1911 he opened an office for the transaction of his business affairs and those of his mother. This office was continuously in existence until he died and all of his business was managed in New York. In 1914, Wilbur K. Potter was employed by Green and his mother as an office assistant, and later became Green's confidential business manager in charge of the New York office, which position he continued to hold as long as Green lived. Mrs. Wilks' business affairs were also managed at Green's New York office.

When Green first came to New York he divided his time between his office and the Seaboard National Bank, where he transacted some of his financial business. After his incapacity in 1921, Green was unable to make personal visits to his office or to the bank, but he maintained daily contact with the office and held frequent conferences at his respective New York City homes with Potter.

Certain corporations were formed to facilitate the transaction of the financial business of the Green family. The Windham Realization Company, Inc., was organized as a vehicle to be used in the foreclosure of mortgages, and the Westminster Company was organized as a kind of a holding company. Both of these corporations came into existence prior to Hetty Green's death. After her death and because of the provision in her will that her estate should be held in trust for a period of ten years, Green Estate, Incorporated, was formed to take over the assets of her estate. None of these corporations did any business

for the public. Their affairs were concentrated in Green's business office in New York City.

Green's business consisted principally in the investment of his and his family's fortune, including the purchase of bonds and other securities and the making of call loans. Every check that Green ever drew came back to his New York City office. When he was absent from New York City his investment business was carried on through correspondence and by telephone, the same as if he were present, and all books relating to the business affairs of Green and his sister were kept in the New York City office, where there was a staff of several employees. He received at least one letter from his office every business day.

There is no basis whatsoever for the finding of the Special Master, at page 21 of his Report, that aside from Green's railroad activities in Texas between 1892 and 1911 he was never in any active business or devoted to the making of money. Green was active in the floral business in Texas and had various other business activities there in addition to the Texas Midland Railroad. He was active in business in New York and gave the same his personal attention until he was physically incapacitated, after which his business affairs were conducted through his office in New York City. He was devoted to the making of money throughout his life. (See Exception No. 58.)

A fact of particular significance in connection with the finding of the Special Master that Green became domiciled in Massachusetts in 1921 is that all of his personal correspondence files were kept at his office in

New York City until he opened the Star Island house in Florida in 1927, after which the files were taken from place to place with him as he traveled, duplicate steel cabinets being provided at Round Hills and Star Island in which he kept his correspondence during his sojourns at those places. The failure of the Special Master to make a finding of these facts is covered by Exception No. 16. If Massachusetts became Green's domicile in 1921, it would have been only natural that he should have kept his personal correspondence files there. His failure to do so confirms New York's contention that Round Hills was merely a place of temporary abode.

One theory upon which death taxes are justified is that they constitute a payment for services rendered and protection afforded during lifetime in building up and maintaining a person's fortune. Substantially the only services rendered by government to Green during his lifetime with respect to his securities and cash, which constituted by far the greater part of his fortune, were those rendered by the State of New York and its municipality. For this reason, the facts that Green's business was transacted in New York, his bank accounts kept there, and his securities kept there gives New York a moral as well as a legal claim to death tax upon the intangibles of his estate. No other state supplied governmental services with respect to his intangibles. In Massachusetts and Florida his holdings were largely real property upon which the regular real property taxes were paid.

Nearly all of Colonel Green's business letters were addressed to him at New York City, which he always

gave as his permanent address. This is an element favoring New York to be considered in determining his domicile.

Dunn v. Trefry, 260 Fed. 147, *supra*.

In *Mitchell v. United States*, 21 Wall. 350, *supra*, elements referred to by this Court as those usually relied upon to establish intent to have a domicile were a house of residence, payment of personal taxes, exercise of political rights, and declarations. Applying these tests to the case at bar it is found that New York is the only State in which Green had both a house of residence and a place of business. The evidence is sufficient to establish a Texas domicile if Green had a home there in fact, but the intent to have a residence in that State, standing alone, is insufficient, for which reason declarations favoring Texas and voting there cannot be given weight. He did not pay personal taxes anywhere. These three elements are not available to any other State. As among New York, Massachusetts and Florida, the latter two had only a house of residence, whereas New York had both a house of residence and the sole place of business which, combined with the fact that Green's only house of residence was in New York from 1911 to 1921, not only establishes his domicile in New York but constitutes proof of its continuance until his death.

Green belonged to numerous social, recreational, business and scientific clubs and associations in New York City, his membership therein continuing throughout his life. He joined a few similar organizations at New Bedford, Massachusetts, but discontinued his membership therein several years previous to his

death. He also joined certain like organizations in Florida in which he never relinquished his membership. His interest in organizations of this character to which he had belonged while in Texas ceased when he left that state in 1911.

In determining a person's domicile the place where he belongs to organizations such as referred to in the preceding paragraph is entitled to weight.

Matter of Lydig, 191 App. Div. 117, *supra*;
Matter of Frick, 116 Misc. 488, *supra*.

Exception has been taken to the failure of the Special Master to find that Green gave up his memberships in Massachusetts social organizations long prior to his death, but maintained his memberships in New York social organizations as long as he lived (See Exception No. 39). This fact is important. If Massachusetts had been the domicile, Green would not have retained his connection with organizations in New York in preference to those in Massachusetts.

Exception has also been taken to that part of the Special Master's Report on page 20 wherein he finds that Green joined clubs, societies and social organizations in every community where he dwelt, but never attended them (See Exception No. 47). The Special Master overlooked the important fact that Green did attend the Union Club, one of the leading men's social organizations in the City of New York.

Green's interest in baseball and the theatre has already been referred to. He had a private box at the Polo Grounds on an annual basis. The lease of this was not surrendered until the spring of 1927 (D. 157).

In anticipation of his moving to New York City and as a preliminary thereto, Green was elected a director of the Seaboard National Bank on July 7, 1910, that being one of the principal banks in New York City at the time. This connection continued as long as he lived. The Seaboard National Bank became the Seaboard Bank, the latter was merged into the Equitable Trust Company, and the Equitable Trust Company was merged into The Chase National Bank, which, at the time of Green's death and for some years prior thereto, was and now is one of the world's largest banking institutions. Green was a director of the Chase National Bank when he died, having previously served as director of the Seaboard Bank and the Equitable Trust Company. He was a director of the Columbia Trust Company of New York City from 1912 until 1920, when he declined reelection. He became a trustee of the New York Produce Exchange Safe Deposit and Storage Company in May, 1914, and continued as such throughout his life. His only other bank directorships had been in Texas banks during his early days in that state.

Green's directorships in New York institutions are strong evidence that New York City was his domicile all his life. Had he intended to change his domicile to Massachusetts or Florida he would doubtless have given up these business affiliations.

In the ordinary course of events, a person selects his personal counsel and his personal and family physician at the place where his domicile is. Green was no exception. His personal attorney was Charles W.

Pierson, head of the New York City law firm of Alexander and Green, and his personal and family physician was Dr. Harry S. Pascal of New York City. Exception has been taken to the failure of the Special Master to find that Mr. Pierson was Green's general personal and business attorney and that Dr. Pascal was his personal and family physician (See Exception No. 8).

In re Dorrance, 115 N. J. Eq. 268, *supra*, at page 280, the Court stressed the fact that Dr. Dorrance's "personal counsel and legal adviser continued to be Judge Lippincott whose offices were in Camden and whose home was near" Dorrance's.

Significant on the question of Green's domicile is the fact that his secretary, Walter H. Marshall, made his home in New York City from the time he came there from Texas with Green in 1911 until the time of Green's death. Exception has been taken to the failure of the Special Master to make such finding (See Exception No. 6). Marshall's family lived with him in New York.

Mrs. Wilks, Green's sister and only near relative, was and is domiciled in New York City. She, too, has a pretentious summer home near the water at Greenwich, Connecticut. There would be as much reason for the contention that Mrs. Wilks is domiciled at Greenwich as there is for the contention that Green was domiciled at his summer home at Round Hills.

On numerous occasions when Green was living in the Waldorf-Astoria and Sherry-Netherland hotels in New

York City, he referred to them respectively as his home. Exception has been taken to the failure of the Special Master to so find (See Exception No. 14).

It may be pointed out in this connection that there is a marked difference between Green's declarations that Texas was his "legal residence" and his statements that New York was his home. The former were clearly self-serving and made for the purpose of deception as to the place where his domicile really was. The Special Master has correctly found that declarations of this character are entitled to no weight.

In *Matter of Trowbridge*, 266 N. Y. 283, *supra*, it was held that the fact that Trowbridge described himself in all his writings and instruments as a resident of the State of New York did not make him a resident thereof, despite the fact that he acted upon the advice of counsel.

See also:

Estate of Harkness, 176 Cal. 537.

The rule is concisely stated by Kennan in his work on *Residence and Domicile*, at page 90, when he says:

> "Declarations which tend to establish a domicile which is advantageous to the declarant are viewed with suspicion and if admitted at all are accorded but little weight. Such declarations occur most frequently in cases relating to suffrage and taxation."

Spontaneous declarations, as distinguished from those of a self-serving nature, are entitled to great weight. When Green was on guard he always stated

that his legal residence was in Texas, but in his unguarded moments he gave expression to his true thoughts and called New York his home.

In *Ross v. Ellison or Ross*, 141 L. T. Rep. 666, it was said (p. 668):

> "Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expression."

In *Jacobs on Domicil*, Section 455, in speaking of declarations, it is said:

> "The time, occasion, and manner of making them, their reasonableness and consistency with themselves and with the other proven facts in the case, the presence or absence of the suspicion of sinister purpose in making them, * * * enter materially into the estimation of their value."

The fact that Green made certain declarations in which he referred both to Massachusetts and Florida as his home has not been overlooked. No better explanation of these declarations could be found than the explanation he himself made when he talked with the witness Strandell of the Railway Express Agency at Miami in 1934. Strandell asked him when he was going back home and Green replied, laughingly, "What do you mean by going back home; I am home." Strandell then said, "What time of the year are you going back," and Green replied, "I am going back home; I am going back when the weather gets too

warm; the reason I laughed was because your agent up in Massachusetts asked me the same identical question last year, last Fall; he asked me, Colonel, when are you going home—back home and I told him the same thing I am going to tell you—I told him whenever your weather gets so that I cannot stand it I am going back to my home in Florida" (D. 405).

The situation here is much the same as that which obtained in the case *In re Paullin's Estate*, 109 Atl. 13, where it was said (p. 14):

> "It is difficult to escape the impression that the witnesses on both sides have measurably overworked the convenient word 'home' in testimony touching statements made by decedent; but whether or not such impressions can be said to be justified, when it is borne in mind that decedent in fact had a winter residence and also a summer residence, references by her to either of them as her home are obviously without great force, unless made so by the context of her statements."

Green's conduct, actions and statements at the time he was compelled to move from the Waldorf-Astoria to the Sherry-Netherland Hotel are strongly indicative of what his true sentiments were with respect to his permanent home. It will be remembered that the Waldorf-Astoria was demolished in 1929, eight years after the Special Master finds that Green became domiciled in Massachusetts, and two years after he had commenced to occupy his winter residence in Florida. That year, instead of remaining in the South until the latter part of May or June as had been his custom, he cut short his winter trip and came back to New York City on April fifteenth. A month previously he had written the manager of the Hotel Plaza in New York City that his old home, the Waldorf-Astoria, had

been sold, that he was expected to vacate by May first, and that he was looking for new accommodations, specifying particularly that he wanted a place where he could keep his stamp collection. At about the same time, he wrote letters to various persons stating that it was necessary that he should return to New York City to find new living quarters. He told Dr. Pascal that he hated to leave his home in the Waldorf-Astoria, as he had considered it his home for so many years. He was actually the last tenant to leave. He wrote a letter to a party in Texas, in which he referred to moving from the Waldorf-Astoria to the Sherry-Netherland Hotel "our new home." When the time came for him to move, Miss Anne Owens, Executive Housekeeper at the Sherry-Netherland, who had formerly been Assistant Housekeeper at the Waldorf-Astoria, where she became acquainted with the Greens, was assigned to assist him and Mrs. Green in selecting furniture to be brought from the Waldorf-Astoria to the Sherry-Netherland. Green indicated to Miss Owens his desire that there be brought to the Sherry-Netherland the furniture and draperies that were in the portion of the Waldorf-Astoria apartment he had personally occupied. He particularly requested the transfer of certain rose-colored damask draperies, which were put up in the living room at the Sherry-Netherland. Several of the officials and employees who had been at the Waldorf-Astoria were transferred to the Sherry-Netherland when the former hotel was razed. Green told Miss Owens that he was not anxious to move, but he thought that going to the Sherry-Netherland, where he would be with the people whom he had known at the Waldorf-Astoria, would make him feel more at home. He said he wanted to take some of the atmosphere of

the old Waldorf-Astoria with him to the Sherry-Netherland and, as it was intended to render as much as possible the same type of service at the Sherry-Netherland as had been given at the Waldorf-Astoria, he thought he would feel very comfortable there. If, in fact, Green had abandoned his New York domicile and had adopted a Massachusetts domicile, the destruction of the Waldorf-Astoria would have furnished an excellent opportunity for him to have severed all ties in New York City, and would have made possible a very substantial saving in rent. Instead of abandoning New York, he secured a new and better appointed apartment at a considerably increased rent. His sentiment for the Waldorf-Astoria might have made him loath to leave there but would not have accounted for the acquisition of a more elaborate home. He left his winter home more than a month earlier than was his custom and came to New York City to personally supervise the moving. These facts negative any idea that he did not consider New York his domicile and intend to retain it as such.

New York has excepted to the finding of the Special Master, on page 33 of his Report, that when Green moved from the Waldorf-Astoria Hotel to the Sherry-Netherland Hotel he wanted to preserve the atmosphere of the old Waldorf-Astoria, on the grounds that such finding is not adequate and that he should have found the facts as recited above (See Exception No. 63).

In considering Green's occupancy of apartments at the Waldorf-Astoria and Sherry-Netherland Hotels, the fact that he was a tenant on a month to month basis

has an important bearing upon the question of a New York domicile. He could have terminated his relationships with New York City upon a month's notice at any time, not being bound by any long term lease or the owner of real estate that he would be forced to dispose of. He was free to abandon every semblance of a New York City domicile whenever he wanted to, but he never did. This is brought into relief when it is considered that, although he always claimed Texas as his legal residence, he stopped paying the small sum of $5.00 per month for a room there in 1914, whereas the rental of his New York City apartments from July 1, 1921, when he took possession of the Round Hills house and, according to the Special Master, made it his domicile, up to the time of his death amounted to the grand sum of $321,024. The annual rental of these apartments was more than the income derived by Green from an investment of half a million dollars. Whatever else may be said about Green, it cannot be denied that he inherited some of his mother's perspicacity and penuriousness. It was because New York City was his home, and had been his home since 1911, that he continued to maintain these luxurious apartments. The reasons why he did not spend more time in New York City will be developed hereafter. They were to a considerable extent fortuitous, but it is certain that after 1921 Green did not spend nearly a third of a million dollars merely for the purpose of having a temporary sojourning place in New York City on his trips North and South, while *en route* from Massachusetts and Florida (See pages 33 and 54 of the Master's Report, and Exception No. 65). He could have rented transient hotel accommodations for the time he spent in New York for a small fraction of the amount he paid as rental of his permanent apartment.

The evidence shows clearly that Green's friends and business associates regarded New York City as his home. The failure of the Special Master to so find has been duly excepted to (See Exception No. 7).

Although the Special Master found, at page 26 of his Report, that Green subscribed through a bank in Terrell, Texas, for $5,000,000 of Liberty Bonds during the World War, he overlooked the fact that he subscribed to between $3,000,000 and $3,500,000 in Liberty Bonds through New York City banks and organizations. His failure to make this finding is the basis of Exception No. 12.

Green was a noted philatelist. His collection ranked as one of the five largest in the world. He never lost his interest in that subject. He first took up collecting stamps while he was living at the West Ninetieth Street house in New York City. The permanent location of his collection was at all times in New York City, although on occasions he took portions of it with him on his travels. At the time of his death, more than eighty per cent of his collection was housed in the Sherry-Netherland Hotel and was valued at more than $1,000,000. Philately was his principal hobby. Exception has been taken to the finding of the Special Master, on page 33 of his Report, that a portion of Green's stamp collection was kept in his apartment in New York City and to that part of the Special Master's Report, on page 38, wherein he finds that the bulk of Green's stamps was kept in the vault in the basement of the Round Hills house (See Exception No. 48).

Exception has also been taken to that part of the Special Master's Report, on page 33, wherein he finds

that Green's interest in his stamp collection has been slight since 1927 (See Exception No. 49).

Green had a great love for his mother and reverenced her memory. Practically his only belongings which were intimately connected with his mother were the letters that she had written to him, over one hundred in number. These letters were always kept at his New York City home and were there at the time of his death. The failure of the Special Master to make a finding in this respect is covered by Exception No. 30.

As heretofore noted, Green voted in Texas until 1920, but he never voted elsewhere, and his failure to vote in New York cannot be counted against the maintenance by him of a New York domicile. Voting in Texas was an act calculated to fortify his claim to a pseudo-legal residence in Texas.

Green's social activities in New York City were much the same as they were at other places where he spent portions of his time. He was not a society lion, but occasionally entertained friends at his home and was in the habit of having young ladies he was educating spend portions of their winter vacations and Christmas holidays with him in New York City. His close personal friends were those whom he had made during the period he lived in Texas. Exception has been taken to the failure of the Special Master to find that Green's protegees spent portions of their vacations with him in New York City (See Exception No. 15).

In 1926, Green and his sister each donated the sum of $125,000 to Saint Mary's School at Peekskill, an Episcopalian institution for girls, to be used in the

erection of a wing in honor of the memory of their mother. A bronze plate, suitably inscribed to indicate the purpose of the gift, was placed upon the structure.

During the last three years of Green's life he studiously avoided New York City. This action was taken upon the advice of his personal counsel, Charles W. Pierson, because certain suits for damages had been commenced against directors of the Chase National Bank, in which Green was named as a defendant. His counsel stated that, in his opinion, if Green remained away from New York, it would not be possible to serve him with process. Green meticulously followed his counsel's advice in this respect and did not return to New York until he was brought to Lake Placid in 1936 on the advice of his physicians at a time when he was in his last illness.

At page 33 of the Special Master's Report, reference is made to the fact that Green and his wife had few personal belongings in their apartment in the Sherry-Netherland Hotel at the time of his death. There is nothing unusual about that when it is coupled with the fact that for three years previous to his death Green had been compelled to remain away from New York to avoid legal service. Under these circumstances it would not be expected that he and Mrs. Green would have much in the way of personal belongings there.

Exception has been taken to that part of the Report of the Special Master, on page 33, wherein he finds that Green in the last three years of his life avoided New York because of efforts to serve him in certain litigation against the directors of the Chase National Bank, because the Special Master did not find that this action

was taken upon the advice of his personal general counsel (See Exception No. 51).

At page 54 of the Report of the Special Master is a summary of the reasons why, in his opinion, there is not sufficient evidence to show that Green ever intended to make New York his permanent home. He states that Green rejected the suggestion when it was made to him by Mrs. Green and Mrs. Stafford in 1917 or 1918. This statement is without support in the evidence. The Record fails to show that Mrs. Green or Mrs. Stafford ever suggested to him that he make New York his permanent home or that he ever rejected it. The Special Master doubtless had reference to the testimony of Mrs. Stafford (D. 207) that she and Mrs. Green talked with Green about building a house on Long Island. It is true that Green said he did not want to build a house there, but by no stretch of the imagination could this be considered a rejection by him of a suggestion that he make New York his permanent home. He was living in New York City at the time and continued to maintain a home there for the rest of his days. The Special Master also stated that Green made no effort to become a voter in New York after he stopped voting in Texas. That is true, but it is also true that he made no effort to become a voter in either Massachusetts or Florida after he stopped voting in Texas in 1920. If the fact that he did not vote in New York shows that he did not intend to make New York his permanent home, it is equally strong evidence that he did not intend to make Massachusetts or Florida his permanent home. The Special Master next states that Green owned no real estate in New York, except what he acquired as a result of the foreclosure of mortgages.

This was due to the fact that he had adopted the custom of wealthy New York residents of living in hotel apartments. He paid the annual income of a half million dollars as rent, which was the equivalent of the maintenance of a substantial real estate interest there. The Special Master states that Green paid no personal or income taxes to New York. Likewise, he paid no personal or income taxes to Massachusetts or Florida. If this fact is proof that New York was not the domicile, it is equally strong proof that neither Massachusetts nor Florida was the domicile. He states that Green had no close friends in New York City and did not like the life or the people, but, at page 20 of his Report, he states that his close friendships were those formed in the early days in Texas. Green had no close friends in Massachusetts or Florida, which tends just as strongly to disprove his domicile in either of those States. He did not like the people in the vicinity of Round Hills and became embroiled in disputes with them. Because of his physical condition, it is probable that he did not like living in New York, which tends more strongly to prove his New York domicile, for despite this he continued to maintain his home there. It is true, as the Special Master states, that after 1921 he was unable to go to theatres or baseball games as theretofore (although he did not give up his box at the Polo Grounds until 1927) and was compelled to spend his time indoors and adopt hobbies which replaced his outdoor activities. These same hobbies were indulged in by him in Massachusetts and Florida. Due to favorable surroundings and weather conditions, he was able to get out in the open more at Round Hills and Star Island, but that was the very reason that he adopted the former as a summer residence and the latter as a

winter residence. The Special Master also states that Green removed all of the furnishings of his former residence at 5 West Ninetieth Street and all of the early associations with his mother, except her letters, to South Dartmouth. He had no use for the furnishings of the West Ninetieth Street house after he adopted the practice of living in hotel apartments, and it was natural that he should remove them to Round Hills when it became necessary to furnish the mammoth institutional type house that he erected there. His most cherished possessions, the letters written to him by his mother in her own hand, remained in New York. Just what "early associations with his mother" he removed to South Dartmouth are not specified by the Special Master or disclosed by the Record. The witness, Van der Putten, who selected the things to be moved from the West Ninetieth Street house to Round Hills and had charge of their removal testified that he had a small truck load of furniture shipped, which included two clocks and private things of the Colonel and a number of pictures (D. 173). The witness, Holcinger, testified that furniture was moved from the West Ninetieth Street house to Round Hills on three occasions between 1918 when the Greens moved to the Waldorf-Astoria, and 1928 that the old paintings were first sent up by Van der Putten and afterwards when the house was torn down the beds and carpets were taken up and in the summer of 1928, just before the house was demolished, the rest of the things were taken. The witness recalls a small picture of Green's mother that Mrs. Green had in her bedroom and which she took with her to the Waldorf. None of the things that Green moved from New York to Round Hills had any particular association with his mother. The fur-

nishings of the West Ninetieth Street house had been acquired by Green in Texas and there is nothing at all to show that the house contained anything in the nature of family heirlooms or of sentimental association with his mother. The statement that all of the early associations with his mother were moved to Round Hills is an incorrect and unwarranted generalization prejudicial to this Respondent (D. 113-4). His sworn statement to the taxing officials of New York City that he was not and never had been a resident of New York did not differ from the statements he made to the taxing officials of Massachusetts and Florida. If they are proof that he was not domiciled in New York, his statements to the Massachusetts and Florida taxing officials are likewise proof that he was not domiciled in either of those States. The Special Master also states that Green never went to his office, 111 Broadway, after 1921, and carefully refrained from visiting the City during the last three years of his life, because of pending litigation. Green's physical handicap prevented him from going to his office. The fact that pending litigation prevented him from visiting New York City during the last years of his life cannot be counted against the New York domicile, as it was an enforced absence. The Special Master next points out that his apartment in the Sherry-Netherland was under a temporary lease and had only been occupied by him for brief periods in the spring and fall while *en route* from Massachusetts and Florida. That there was a temporary lease argues more strongly for than against New York as the domicile. He could have moved out at any time, particularly when, in 1933, he knew that he would be required to be absent from New York for a long period of time on account of the bank suits. If he had not desired and intended to retain his

New York domicile, he would surely have given it up then, instead of continuing to pay rent in excess of $20,000 a year for a period of almost three years, when his death occurred. The amount of time spent by Green in New York City is not controlling, as will be set forth in detail at another point in this brief.

The paragraph of the Special Master's Report, on page 54, which has just been discussed, contains the important reasons which impelled him to find against a New York domicile. It is respectfully submitted that these reasons are inapplicable and wholly inadequate to support his conclusion.

Green's mother died in July, 1916. Previous to her death he had become moderately wealthy by reason of gifts she made to him. When she died he became very wealthy, as her entire estate was divided between him and his sister. He was then for the first time in a financial position whereby he could gratify his desires without counting the cost. He purchased a Great Lakes steamship and remodelled it into a yacht, which he named the "United States," and which was then reputed to be the largest private steam yacht in the world. On July 10, 1917, he married his housekeeper, Miss Harlow, and they spent their honeymoon on the yacht. They made a trip up Long Island Sound, in the course of which they inspected the Round Hills farm, and then returned to New York, after which they went to Texas, and returned to New York again in the latter part of December. After spending a couple of weeks in the West Ninetieth Street house, they took up their residence at the Waldorf-Astoria.

At page 35 of his Report, the Special Master comments that after Green's mother's death in 1916 and his marriage in 1917, he was free to establish a permanent home in any locality that he considered suitable, because he then had no attachment to the soil anywhere and was free from restraint. He overlooked the fact that Green had already established his permanent home in New York City where he was as much attached to the soil as are ninety-eight per cent of the people who make their homes in that city. His freedom from restraint was probably what led him to give up his less pretentious residence at 5 West Ninetieth Street and take a large and expensive suite of rooms at the Waldorf-Astoria.

The Special Master found, at page 32 of his Report, that during the latter half of 1917 Green lived on the "United States" anchored off West Eighty-Sixth Street, New York City, a finding that is not sustained by the evidence and has been duly excepted to (See Exception No. 62).

Green's mother had requested him to erect a monument to her at Round Hills. Exception has been taken to the failure of the Special Master so to find (See Exception No. 19). Round Hills had been in Hetty Green's family for over two hundred years and had been used by her and her aunt, Sylvia Ann Howland, as a summer recreational resort. Green and his sister had been there a couple of summers when they were children. When Green visited there in 1917, he planned to spend his summers there on the yacht and arranged for the construction of a wharf at which to moor the yacht, a water tower to supply it with water,

for the construction of bath houses and for farming operations to supply him with vegetables.

The Special Master, at page 35 of his Report, found that when Green visited Round Hills in August, 1917, he determined to develop the property into a great estate and build there a monumental home. This finding is excepted to (See Exception No. 52) as it distorts the facts and creates an impression that is false and erroneous. The Record is clear that Green's intention when he first went to Round Hills was to live on the yacht during the summers and that the building of a house there was a later development.

After the wharf was constructed at Round Hills, it was found that, due to water and tidal conditions, the plan to moor the yacht there was not feasible, so in the summer of 1918 the yacht was moored in Padanaram Harbor, several miles from Round Hills, and Green lived upon it there, making frequent excursions on it to Round Hills.

In 1919, Green again went to Massachusetts for the summer and started to live on the "United States" in Padanaram Harbor, where he remained until the boat sank in August, but continued his excursions to Round Hills.

Living at a considerable distance from Round Hills seems to have proven unsatisfactory, for in June of 1919 Green contracted for the erection of a house at Round Hills. He had caused plans to be prepared by A. C. Bossom, an architect of New York City. The building was designed along institutional lines, but

the plans were so arranged that it could be used as his residence for the time being. Green stated that he was going to use the house for his summer home.

The summer of 1920 finds Green again in Massachusetts on a houseboat in Padanaram Harbor. He occupied himself with overseeing the construction of the Round Hills house and other buildings on the property.

The land upon which the house was being constructed had been part of the estate of Hetty Green and was owned by Green and his sister, Mrs. Wilks, as tenants in common, in which condition the title remained until Green's death.

In 1921, Green again repaired to Massachusetts for the summer. He lived on the houseboat in Padanaram Harbor for a while, and late in July moved into the Round Hills house, which had then been completed.

The house was enormous in size and was constructed of granite walls with a slate roof. It was entirely fireproof. The ceilings were hung and the walls were made of terracotta or gypsum blocks. The frame was so arranged that the walls bore no weight and could easily be removed or shifted. The house was generously sprinkled with electrical outlets, most of which were concealed, the purpose being to have them available when the building should be made over into an institution. The principal rooms in the house were wainscoted along institutional lines. Because of the fact that, from an architectural standpoint, the building was institutional in type, it had been found necessary to

reate enormous rooms to permit it to be utilized tem-
orarily as a residence, and, as a result, the dining
ooms, living rooms, library and bedrooms were tre-
endous in size.

Exception has been taken to the failure of the Special
laster to find that the Round Hills house was con-
ructed by Green for other purposes than a home and
at he was using it to live in until he had developed
ound Hills for a memorial for his mother and his
ncestors (See Exception No. 20).

Exception has also been taken to the failure of the
ecial Master to find that by far the larger percentage
the electrical outlets in the Round Hills house were
ic :aled and intended for use when the building
ould be converted into an institution (See Exception
. 25).

Green frequently announced his intention of carry-
out his mother's request for a memorial and said
t he would convert the house into some type of an
titution when he and his sister decided what they
nted to do in that regard. During most of the years
er the house was built, Mrs. Wilks paid the taxes
n the share owned by her in the house and upon
land on which it was erected. Exception has been
n to the failure of the Special Master to find that
. Wilks paid these taxes (See Exception No. 26).

the course of the construction of the Round Hills
se, it developed that the architect had arranged for
carving of Green's initials in the stone over the
ico at the main entrance. When Green discovered

this he immediately ordered his initials to be chiseled off and stated that he did not wish his name to appear upon the building as it was to be a memorial to his mother. He arranged for the preparation of bronze plates containing suitable inscriptions to show that the house was a memorial to his mother and his ancestors. He also ordered changes to be made in the engraving of the stonework of the building in order to bring the design into more bold relief and give it the appearance of an institution, at which time he stated that the house was not to be a residence. He discussed the use of the building as an institution with many of his friends and acquaintances, but death intervened before his plans in that respect were culminated.

Exception has been taken to the failure of the Special Master to find that Green had his initials cut from the stonework of the Round Hills house and that he said he did not wish his name to appear upon property owned by his mother or his ancestors (See Exception No. 21).

In arranging for a tablet to be erected in connection with the old whale ship "Charles W. Morgan," Green stated that he did not wish to have his name placed upon the tablet if it was to be erected upon land owned by him and his sister, but that it would be all right to put his name on it if it should be erected on land owned entirely by him. The failure of the Special Master to so find is covered by Exception No. 22.

The importance of the evidence with respect to the carving of Green's initials from the stonework of the house and his refusal to have a tablet bearing his name erected upon land owned by him and his sister is very great. There surely could be no reason why he should

wish to have his name and initials omitted if the building was to be his home. That he had no adversion to such procedure is shown by the fact that he had his initials conspicuously displayed in several places on his Star Island home.

One of the principal facts relied upon by the Court in *Matter of Trowbridge*, 266 N. Y. 283, *supra*, was the inscription which Trowbridge had engraved in the stone mantlepiece above the fireplace in the dining room of his Connecticut house, which read:

> "*O noctes cenaeque deum quibus ipse meique ante larem proprium vescor*" ("O nights and feasts of the gods which I and mine enjoy before our own hearthstone"). (P. 290.)

Other facts of importance in the *Trowbridge* case were that over the main entrance to his Noroton house was a cartouche bearing the coat-of-arms and crest of the Trowbridge family cut in the marble and on either side of the dining room mantelpiece were doors upon which were the coat-of-arms of the Trowbridge family. Also, cut in the marble upon the structure just outside the parlor was the Trowbridge family motto: "*Spes pons vitae*" (Hope, the bridge of life). [Trowbridge finding No. 12; Conn. Exs. 14-G, 14-K, 14-L, 14-M, pps. 478-83 and 14-P, p. 487, Trowbridge Record.]

Had Green allowed his initials to be placed upon the Round Hills house or a tablet bearing his name to be erected on the premises which had belonged to his mother, such action would have been strong evidence to support the theory of a Massachusetts domicile. Conversely, the fact that he ordered his initials cut

from the stone and refused to have his name appear on the tablet is strong evidence that he did not intend to establish a Massachusetts domicile.

At pages 53-4 of his Report, the Special Master states that Green had some unformulated notion of leaving a memorial to his mother, his sister and himself, and that the Round Hills house seemed to him to be the most appropriate memorial he could leave after death and the most permanent home he could enjoy while living. Exception to this statement has been taken (See Exception No. 71). The facts which have just been set forth show conclusively that Green had no idea of making the Round Hills house into a memorial for himself. Also, the evidence shows that he did not intend it to be a memorial to his sister.

Green's intention and action with respect to making the Round Hills house into a memorial for his mother indicated much more than is implied by the use of the word "notion." His mother requested him to erect a monument to her memory. He proceeded to do so and caused a mammoth building, designed along institutional lines, to be erected at an expense of nearly half a million dollars. He frequently stated that it was his intention to use the building as an institution.

The Special Master's statement that the Round Hills house seemed to him to be the most appropriate memorial he could leave after death and the most permanent home he could enjoy while living is gratuitous and without support in the Record.

Green invariably referred to Round Hills as his summer home, and never said that it was his permanent home.

A case closely in point on the facts in relation to the memorial plan is *Matter of Martin*, 173 App. Div. 1, revsg. 94 Misc. 81, *supra*. Martin had purchased a house in London and fitted it up as a residence, with the intention of living there while in London, but regarded it as having been acquired primarily to provide a home for a collection that had belonged to his deceased friend, Sands. Sands had made a pecuniary bequest to Martin with which to provide a place where the collection could be kept. The lower court held that Martin was domiciled in London, but the Appellate Division held that his domicile in New York City had not been lost, despite the fact that his domicile there was in a hotel where he did not even have permanent quarters. Martin's London house did not become his domicile because he acquired it for the special purpose of housing Sands' collection. By the same token, the Round Hills house, having been built by Green for the special ~~purchase~~ purpose of a memorial to his mother, did not become his domicile, although he intended to live there summers while his plans for the memorial were being developed.

The evidence is to some extent conflicting as to whether Green intended to turn the Round Hills house into an institution during his lifetime or after his death. In nearly every instance when he spoke about making it into an institution, he did not fix any definite time. The fact that he made no provision in his will for converting the house into an institution is inconsistent

with the contention that he did not intend that it should become an institution until after his death, but there is nothing in the evidence inconsistent with an intention to make it an institution during his lifetime, despite the fact that he died before his intention was effectuated. The fact that he made no provision in his will for the maintenance of "Whaling Enshrined" after his death is evidence of an intent to accomplish his purposes with respect to all of his Round Hills interests while he lived. If his motivating thought was that the Round Hills place should become a memorial after his death, he most certainly would not have neglected to make suitable provisions therefor in his will.

Exception has been taken to that portion of the Report of the Special Master on page 36 wherein he finds that Green retained the whole Round Hills estate of about two hundred seventy acres up to the time of his death (See Exception No. 70). This is contrary to the evidence, which shows that the land inherited by Green and his sister from their mother, upon which the Round Hills house stood, consisted of about one hundred thirty acres and that this land continued to be owned by him and his sister as tenants in common up until the time of his death. Green did acquire additional land at Round Hills amounting to about one hundred forty acres and the combined acreage at Round Hills was two hundred seventy acres, but he never owned more than an undivided one-half interest in the one hundred thirty acres.

The Report of the Special Master indicates that Green had considerable sentiment for the Round

Hills place because it had been in his mother's family so many years, and seeks to translate this into an argument in support of the finding of a Massachusetts domicile. It is true that Green sometimes spoke of the place as having been in his mother's family, but his true sentiment with respect to it is found in the fact that he grossly neglected the house upon the premises which had been the home of his ancestors and was known as the old Howland house. He allowed it to fall into such a bad state of repair that it was dangerous to even enter the building. It continued in this state until after his death, when the administrator appointed in Massachusetts found it necessary to make certain repairs in order to prevent it from becoming a nuisance. A graveyard was maintained in connection with the old Howland house. Green's lack of sentiment for his ancestors is shown by the fact that he made use of this graveyard for the purpose of burying a dog. Exception has been taken to the failure of the Special Master to find that Green had no interest in the Howland ancestral home (See Exception No. 27).

At his own request, Green was buried in the burial plot at Bellows Falls, Vermont, which had been in his family for more than one hundred years and contained the graves of his mother, father, grandmother, grandfather and great great-grandmother. The failure of the Special Master so to find is the basis for Exception No. 46. This is a fact of much greater importance to indicate that Green was not domiciled at Round Hills than is the fact seized upon by the Special Master, at page 55 of his Report, to support a Massachusetts domicile that Green's obsequies were conducted

at Round Hills, particularly as it does not appear that they were so conducted at his request. Burial at Bellows Falls points away from Massachusetts.

Isham v. Gibbons, 1 Bradf. 69, *supra*.

Round Hills was Green's summer residence, pure and simple, and never became his domicile. Before he erected the house he stated that he was going to spend his summers there. When the house was in course of construction and after it was finished, he referred to it as his summer home and continued to refer to it as such throughout his life. There is not an iota of proof in the Record showing that Green ever intended it to be his permanent home or his domicile. His friends and associates regarded it as his summer home.

Exception has been taken to the failure of the Special Master to find that Round Hills was a summer home in the ordinary sense of the term and was so regarded by Green and his friends and associates, and was never intended by him to be his domicile, and that it had been used as a summer recreation place by his mother and by his great aunt, Sylvia Ann Howland, before him (See Exception No. 31).

Each and every year from the time when he first went to Round Hills in 1918 until the year preceding his death, Green spent only the summer season at Round Hills. With few exceptions he came there on the first of July and remained for periods varying from three and a half to five and a half months. The late summer and fall at Round Hills, when the weather is propitious, is to be preferred to the early summer when a great deal of fog and dampness is encountered.

Round Hills is situated between two summer colonies, Nonquit on the north and Salters Point on the south. Nonquit is a summer resort. The people who summer there arrive in June and July and usually leave in September or October, when their houses are closed up, although some stay late in October and a few remain until November. Salters Point is also a summer colony and most of the people there close their houses during the winter, although a few families live there the year round. Former Ambassador Alanson B. Houghton has his summer home immediately below Round Hills.

The fact that a large portion of the population in the vicinity of Round Hills is transient and consists of summer residents is entitled to consideration in determining whether Green intended to make Round Hills his domicile.

Reed's Will, 48 Orc. 500, *supra*.

That occupancy of a summer home does not have the effect of changing domicile has been held repeatedly.

In the *Town of Clinton v. Town of Westbrook*, 38 Conn. 9, it was said (pp. 12-13):

> "There seems to be no more occasion to hold that the temporary occupancy by these parties of a house in Wallingford interrupted their legal residence in Durham, than there would be to hold that a citizen of one of our cities who occupies his own cottage by the sea side or in a country town, during the summer months, thereby changes his residence. The *animus revertendi* exists in either

case, and controls the legal consequences of the act."

See also:

Estate of Austin, Myrick's Probate Reports [1872-9] 237, *supra*.

The late John D. Rockefeller had a summer home in Forest Hill, near Cleveland, Ohio, to which he annually repaired with his family, servants and secretary, his intention being to return to New York at the close of the summer season. In a proceeding in the Federal Court, it was held that his domicile was in New York. The facts of that case are very similar to those in the case at bar. Rockefeller also had a winter home in Florida. The Court said:

"There can be no doubt upon the testimony introduced that Mr. Rockefeller's coming to East Cleveland was for the purpose of a summer visit, without any intention on his part of giving up his residence in New York, but with the fixed purpose to return to his New York home in the autumn."

Rockefeller v. O'Brien, 224 Fed. 541, 543; affd. 239 Fed. 127; appeal dismissed 244 U. S. 650.

It was held in *Matter of Packard*, 223 App. Div. 491, affd. 251 N. Y. 543, that a summer or seasonal home did not become the domicile, even though it was the desire of the owner that it should. The opinion of the Appellate Division on the question of domicile was short, and the Court of Appeals affirmed without opinion, but the record shows that William D. Packard, the decedent, one of the Packard brothers of automobile fame, who died on November 11, 1923, had been

domiciled in Warren, Ohio, but decided to change his domicile to New York State because of oppressive personal property taxes in Ohio. He consulted attorneys and was advised as to the steps deemed necessary to be taken to bring about a change of domicile, which advice he followed. For some time he had had a modest summer home on the shores of Chautauqua Lake in New York State. When he decided to change his domicile, he erected a very substantial house on said lake, suitable for year-round occupancy, which he called "Packard Manor," and in which he lived during a portion of each year. In the years 1921, 1922 and 1923, he lived there from May to October, inclusive. The new home was erected in 1917 and cost $164,000. Packard made his federal and state income tax returns on the basis of being a resident of New York State. He did not vote anywhere. For the last several years of his life he was an invalid, totally blind and partially paralyzed. After the erection of the house in New York State, he continued to maintain a residence in the City of Warren, Ohio, and in 1920 constructed there a duplicate of the house at Chautauqua Lake. He filed non-resident personal property tax returns in Ohio. It was held that he was domiciled in Ohio at the time of his death and that his summer residence in New York State had not become the domicile, despite his definitely expressed intention that it should.

In *State v. Ross*, 3 Zabriskie, 517, a case involving a party domiciled in Georgia who had a summer residence in New Jersey, Chief Justice Green said (p. 521):

> "A temporary residence, for the purpose of business or pleasure, continued for days, weeks, or even months, while the party's domicile is elsewhere, and while he has no intention of becoming a citizen of this state, does not, as has been already said, constitute an inhabitant. It is perfectly immaterial, for this purpose, whether he makes his temporary residence in his own dwelling, with his domestic establishment and retinue about him, or as a mere lodger in the house of another."

When Green built the house at Round Hills his domicile was in New York City. He always went to Round Hills for the temporary purpose of spending the summer and to obtain recreation. He had no intention of becoming a citizen of Massachusetts. The facts that he remained there annually for several months and lived in his own dwelling with his domestic establishment and retinue about him did not operate to change his domicile.

In the last cited case, Mr. Justice Elmer said (p. 525):

> "I do not think that it is the meaning of the act, that the citizen of another state, who comes into this state with his family, and lives for a few weeks or months in a lodging house or in his own dwelling, with the intention of returning, should be considered as residing in the township or ward in which his lodging or dwelling happens to be situate, so that he is liable to be taxed for bonds or other personal property having no proper locality within this state."

In *Younger v. Spreckels*, 12 Cal. App. 175, it was said (p. 177):

"The mere inhabitancy of a summer home or country house at certain seasons of the year or at certain times would not make the party inhabiting such house a resident of the county in which such house is situated. The material question is the *animo manendi*. Although one may abide at times in a place for pleasure or health or repose it does not become his domicile unless it be his intention to remain there."

Although a person's dwelling-house in one state is more comfortable or better furnished than his dwelling-house in another state and he spends the greater portion of his time there, these facts are not conclusive on the question of domicile.

Hurst v. City of Flemingsburg, 172 Ky. 127.

Green's summer home having been his place of outdoor recreation, the fact that he enthused about the things he was doing there does not indicate that he had a domiciliary intent in regard to it. A somewhat similar situation was under consideration in *Huntly v. Gaskell*, 1906 A. C. 56, *supra*, where the Court said (p. 71):

"No doubt at all he was very fond of the place; and, being a person of emphatic and florid speech he spoke of it occasionally—especially (although not always) when addressing Deeside people—as his true home, and the place where he felt at home. But it is a fallacy to regard this an election of one home in substitution for another. A great many people who have a house in town and a house in the country have two homes—they speak of them as such, each is the home when the household goods are there; and the country house, being the place of recreation, is generally the object of the more exuberant expressions of attachment."

In *Dunn v. Trefry*, 260 Fed. 147, *supra*, the appellant (like Green) had three residences, the original one in Newport, Rhode Island, another in Holderness, New Hampshire, and the third in Boston, Massachusetts. She spent her winters in Boston, her summers in Holderness and the spring and autumn in Newport. It was held that she was domiciled in Newport, the Court saying (p. 149):

> "The appellant's domicile in Newport is presumed to continue there until it is shown to have been changed, and the burden of overcoming this presumption rests upon the defendant. Mitchell v. United States, 21 Wall. 350. This we think has not been done. On the contrary, the evidence shows that the appellant never has intended to abandon her domicile in Rhode Island. Her residence in Massachusetts has not differed from her residence in New Hampshire, and it is not fair to say that she has intended to make either place her domicile."

Green's New York domicile is presumed to continue and there is no proof that he ever intended to abandon it. His residence in Massachusetts did not differ from his residence in Florida and it is not fair to say that he intended to make either place his domicile.

Justice Davis in *Gilman v. Gilman*, 52 Me. 165, in considering the application of the rules of domicile to situations in which there are both country or summer and city or winter residences, said (p. 176):

> "If any general rule can be applied to such cases, we think it is this: *that the domicil of origin, or the previous domicil, shall prevail.* This is in accordance with the general doctrine, that the *forum originis* remains until a new one is acquired. 3 Kent, 431; *Kilburn v. Bennett*, 3 Met.,

199; *Moore v. Wilkins*, 10 N. H. 455; *Hood's case*, 21 Penn., 106. And this would generally be in harmony with the other circumstances of each case. If the merchant was originally from the country, and he keeps up his household establishment there, his residence in the city will be likely to have the characteristics of a temporary abode. While, if his original domicile was in the city, and he purchases or builds a country house for a place of summer resort, he will not be likely to establish any permanent relations with the people or the institutions of the town in which it is located."

That the situation in the case at bar is not unusual is evidenced by the statement appearing in *Kennan on Residence and Domicile*, at pages 107-8, where the author says:

"Even with people of moderate means it is not unusual to have both a city and a country residence; while in the case of the very wealthy it often happens that they have, in addition to their city home, a winter residence in Florida or California, a summer home on the seashore and a hunting lodge in the wilds of Canada. In a recent case of considerable importance it was shown that a certain well-known millionaire had several costly residences in widely separate localities which he or his family occupied from time to time."

At page 109, Kennan says:

"The principle involved may be illustrated by the following state of facts which will be met with very frequently: A has large business interests in B where he has had his principal residence for many years. The mere fact that he declares his residence to be at C where he spends a few months every summer in a country home is not controlling; nor would the fact that he voted at the latter place necessarily be conclusive."

If a declaration that a summer home is the domicile, coupled with the act of voting there, would not be conclusive, how much more inconclusive the facts in this case are. Green always declared that his residence was not in Massachusetts, he never voted there and refused to run for public office there.

In *Matter of Long*, 167 Supp. 1023, the decedent had a farm in Pennsylvania and lived on it from May until December, during the later years of his life. The remainder of the years he lived in New York City. In his will he stated that it was his intention to make the Pennsylvania farm his legal residence for all purposes. He referred to it as his summer residence. The will was executed a little more than a year before he died. It was held that the summer residence did not become the domicile, despite the fact that Pennsylvania was his domicile of origin and New York his domicile of choice. The Court said (p. 1024):

> "From these facts it would appear that, while the decedent's domicile of origin was in Pennsylvania, he abandoned that domicile and acquired a domicile in New York about the year 1880, when he built the house in this city and occupied it as a home for himself and his family. While he evidently intended in the later years of his life to change his domicile from New York to Pennsylvania, he did nothing of a decisive controlling character which would indicate that he had actually abandoned his domicile in this state and acquired a new domicile in Pennsylvania."

Green's acts, said to evidence a change of domicile from New York to Massachusetts were of a much less positive character than were the acts of the decedent in the case cited.

In *Matter of Frick*, 116 Misc. 488, *supra*, it appeared that Frick had a residence in Pennsylvania in which he was originally domiciled, which he had acquired in 1882, that in 1902 he acquired a summer residence at Pride's Crossings, Massachusetts, where most of his summers were spent until the time of his death, that in 1905 he leased the Vanderbilt house at 51st Street and Fifth Avenue, New York City, and in 1914 took possession of his new mansion at 70th Street and Fifth Avenue in said city. From 1904 to 1919 he divided his time between Pittsburgh, Philadelphia, New York, Pride's Crossing and various summer and winter resorts. The time spent by him in New York continued to increase from year to year. He was held to have been domiciled in Pittsburgh. Surrogate Foley said (p. 493):

> "The establishment of a separate dwelling in another state, and the relative size or magnificence of the various houses conducted by Mr. Frick are not tests of his change of domicile. If so, the establishment of a summer residence in Massachusetts in 1902, antedating the acquisition of his first New York residence, would have effected a change of domicile from Pennsylvania to Massachusetts. The maintenance of each of the independent dwellings in New York City and Pride's Crossing did not supplant, but paralleled the continuation of his domicile at Pittsburgh."

The Report of the Special Master indicates that the matters of size, cost and magnificence played an important part in guiding him to his conclusion. He refers to the "monumental home" at Round Hills, the sixty buildings on the property, the elaborate furnishings of the house, the large number of acres in the property, the expenditures of nearly $7,000,000 at Round Hills as compared with $1,500,000 at Star Is-

land, etc. As stated in the opinion in the *Frick* case, these elements are not determinative of domicile.

The Court will doubtless take judicial notice of the fact that there is nothing unusual about a multimillionaire having a summer home on the seashore. The Special Master recognized this when he referred to the millionaires' palaces on the rocks at Newport. If summer and winter homes ~~may~~ become domiciles, despite the fact that the owners have not given up their previous domiciles elsewhere, many of our foremost citizens are due to receive a rude shock.

In referring to Round Hills, Green and his secretaries and servants often called it "the farm" or his "country place." The failure of the Special Master to so find is covered by Exception No. 33.

In *In re. Zerega's Will*, 20 Supp. 417, the decedent had residences in New York City and in Westchester County, New York. He referred to his Westchester residence as a "country seat" or "country place," which the Court considered evidence tending to establish that it was not the domicile. In this case, the Court also considered proof that the country place was closed in the fall and left closed until the owner came back in June to be evidence that it was not the domicile.

Proof that Round Hills was nothing more or less than a summer home is supplied by Green's attitude toward it and the way in which it was conducted.

The Round Hills house required a large staff of servants to look after it and supply necessary services while

Green lived there. In 1921, the first year that the house was opened, the servants were kept the entire year, although Green left there about the middle of October. The reason for this is not disclosed by the Record. It may have been that the regular routine had not been developed, or that some other reason existed for keeping a full staff of servants the first winter. However that may be, after 1921 until the Star Island house was occupied in 1927, the servants at Round Hills were employed for the summer only, with the exception of a few who remained during the winter and acted as caretakers. In 1927 and thereafter, the servants were employed on a year round basis and divided their time between Round Hills and Star Island.

The Special Master evidently became confused as to the proof in regard to the employment of servants at Round Hills, for, at page 38 of his Report, he finds that after the winter of 1921-22 a skeleton staff of seven or eight servants was left in the Round Hills house in the winter and the remainder went back and forth between Round Hills and Florida. This is covered by Exception No. 53, which New York considers of great importance in proving that Massachusetts did not become the domicile in 1921 or at any other time. This will be developed later on in this brief.

Each year after the Round Hills house was occupied, when Green left at the close of the summer season, the house was closed, storm doors were put on and the windows were boarded up, the furniture and pictures were covered with cloths, the silverware was put away in a safe, the china was wrapped up and put away, the

linen was put away, the flowers that had been used in the house were put back in the greenhouses, the main kitchen was closed up so that it could not be used, and the draperies and hangings were covered with cloth bags. In other words, the house was closed up so as to be no longer suited for occupancy by the owner in precisely the manner that people who own summer homes close them up at the end of each season. The finding of the Special Master, at page 39 of his Report, that the furnishings were covered and protected is deemed inadequate as it does not give a full picture of the desolateness of the Round Hills house during the bleak New England winters. Exception to the finding has been taken (See Exception No. 54).

The Special Master also found, at page 39 of his Report, that the Round Hills house was kept heated throughout the winter. Such finding standing by itself may well convey an erroneous impression. It was necessary to heat the house in winter in order to protect it from the elements, and the Special Master should have found this (See Exception No. 24). To merely state that the house was heated in winter creates the impression that it was heated in order that it might be ready for occupancy, which is not the fact. During the fifteen years that Green occupied the Round Hills house he never spent a single day there during the winter season, and he came there before the first day of July only in the years 1934 and 1935.

Green's activities at Round Hills were such as a person of his personality and bents might be expected to indulge in at a place of summer recreation. He dabbled with scientific matters in the same manner that

a child picks up and discards toys. He would engage in first one thing that caught his fancy and then lose interest in it and take up another. Being a man of great wealth, it was possible for him to occupy himself during the outdoor season with such things, the same as the average person goes in for golf, tennis, or other sports. It must be remembered that Green was not normal physically, but had lost one of his legs and suffered from rheumatism and arthritis so that the diversions that occupy the recreational time of the average person were denied to him. There was nothing about Green's interests at Round Hills that was of a domiciliary nature. On the contrary, it would be most unusual for a person to turn his domicile into a public amusement park, equip it with radio broadcasting stations with immense towers over one hundred forty feet in height, turn his lawn into an airplane field, his private beach into a Coney Island and erect a Neon sign on his house with letters twelve feet in height to serve as an aviation signal. All these things are compatible with a summer recreation place.

Green had been interested in radio long before he built the Round Hills house. He found pleasure at Round Hills in erecting a large and well equipped radio broadcasting station and also placed loud speakers at various points on the premises to provide entertainment for the public who came there in large numbers to listen. He thereby incurred the enmity of his neighbors. Among his notions was one that he could broadcast music from the shore in front of his house to the passenger ships as they passed by on the ocean. So great was his interest at first that when the radio station was being built in 1922 he remained at Round

Hills until December seventeenth to follow the work, but he soon lost interest and in 1926 or 1927 ceased broadcasting operations. During the brief period that he played with the idea, he had programs transmitted by wire from New York City to be rebroadcasted at Round Hills.

The facilities of the broadcasting station were made available to the Massachusetts Institute of Technology for experimental purposes after broadcasting was discontinued.

Photography also claimed Green's interest for a while. In 1924, he equipped a photograph studio, which was modern and complete in every respect, and employed a photographer to take charge of it. He built a house to use in taking photographs that was so arranged that it could be turned in a circle while the camera remained stationary and caused certain experiments to be conducted. The photographic activities were confined to the summer. In the winter the studio was closed, the cameras were covered with cloth, the liquid chemicals were thrown away, and the lenses were taken to the big house and stored there. The studio was closed up so that it would be all right for the winter. Each summer after Green arrived at Round Hills, the studio would be opened up and made ready for use again. By 1928 Green had lost interest in photography and after that year the studio was not operated. Exception has been taken to the failure of the Special Master to find that Green discontinued his interest in photography and closed his photographic laboratory at Round Hills in the year 1928 (See Exception No. 29).

Shortly after Lindbergh made his historic flight to Paris, and probably inspired by that event, Green became interested in aviation and spent a large sum of money in turning the land at Round Hills immediately adjoining his house into an aviation field, erecting an airplane hangar, a blimp house, and a marine runway. He encouraged the public to use the field and sold airplane supplies at cost. With his approval, one of his employees established an aviation school. As before stated, a huge Neon sign, consisting of letters twelve feet high, spelling "Round Hill," was erected on top of the Round Hills house. His interest in aviation gradually declined and finally ceased in 1934.

Exception has been taken to the failure of the Special Master to find that Green had a red Neon sign made of letters twelve feet in height placed on top of the Round Hills house as an aviation beacon (See Exception No. 23).

The Massachusetts Institute of Technology was permitted by Green to carry on certain research work at Round Hills and he contributed toward it. Among other things, experiments were conducted in connection with communications with aircraft, fog dissipation and the smashing of atoms. In 1934, Green lost all interest in this work, as evidenced by his refusal to make further contributions.

Another outlet for Green's enthusiasm was the acquisition by him of an old whaling ship, the "Charles W. Morgan", which he caused to be brought to Round Hills and there placed on exhibition. He created a corporation, known as Whaling Enshrined, to hold ti-

tle to, care for and exhibit the "Morgan". People came to Round Hills in swarms to visit the ship, which was manned by a full crew. He also started a whaling village, which was designed to become a part of the whaling exhibit, and in that connection caused certain buildings to be moved to Round Hills, including a candle shop, an oil refinery and a blacksmith shop. He commenced the construction of a whaling museum and the concrete foundation walls were put in, but the project was later abandoned and the walls covered up. The reason for giving up this idea was that Mrs. Green suggested to him that the Round Hills house would be more satisfactory as a museum and he acquiesced in the suggestion. A portion of the house on the third floor was set aside as a whaling museum, but his plans for devoting the house in its entirety to that purpose never culminated.

Exception has been taken to the failure of the Special Master to make a finding that in 1925, after the foundation was constructed, Green abandoned the erection of a whaling museum at Round Hills because he thought the Round Hills house was better suited for that purpose, it being his intention to erect a smaller house on the Round Hills property for his use while spending the summers there (See Exception No. 28).

By permitting the public to use Round Hills as a recreational place, in the nature of an amusement park, Green evidenced an intention not to make it his domicile. Such use characterized the occupancy there as a place for outdoor recreation but was wholly inconsistent with the idea of a permanent home.

From the very beginning of his occupancy of the Round Hills house as a summer residence, Green encouraged the public to come to the grounds. People came there by thousands to listen to the radio broadcasts from loud speakers. They came there by thousands to bathe in the ocean. They came there by thousands to visit the old whaleship. In October, 1925, Green told a reporter for a Boston newspaper that he had had as many as twenty thousand visitors at Round Hills in a day. From 1925 to 1935, 1,275,923 people visited the whaleship.

Numerous signs directing the public to Round Hills were erected on roads leading to the premises and there were numerous parking signs at the entrance to the property and on the premises. Texas Exhibits 337 to 342, inclusive, are photographs which give a fair representation of various traffic signs and of the way in which the premises were arranged for the accommodation of the public. The use of the property by the public necessitated constant attention to the grounds. The road along the beach, the beach itself and the adjacent airport would be littered with wastepaper, swill and other refuse left there by the public. It took from eight to ten men to clean up the premises after a large crowd had been there. Visitors parked their automobiles on the beach and used them for dressing rooms. Others put up tents to dress in. Typical crowds at the beach are shown by the photographs which constitute Florida Exhibits 41 to 45, inclusive. Green permitted the operation of a diner or hot dog stand for the accommodation of the public. It is hard to conceive of a place devoted to such purposes as being a man's home. On the contrary, the indication is that

of a place where the restraints associated with a home are cast aside and where the carnival or holiday spirit is given full rein.

Exception has been taken to the failure of the Special Master to find that the grounds at Round Hills were used by the public in summer in much the same manner as an amusement park (See Exception No. 34).

The Special Master, at page 47 of his Report, finds that everything Green did in Florida indicated a seasonal vacation and relaxation from physical and mental effort, such finding being used to establish that Florida was not the domicile. With this finding New York agrees, but a seasonal vacation and relaxation from physical and mental effort was as strongly indicated with respect to the Round Hills establishment, and likewise tends to establish that Round Hills was not the domicile. The Special Master erred in not making a finding in regard to Massachusetts such as he made in regard to Florida. Exception No. 32 covers this point. Both Star Island and Round Hills were seasonal homes and neither ever became the domicile.

A point of importance with respect to Round Hills being the domicile is that on the different occasions when Green was taken seriously ill there his family physician, Dr. Pascal of New York City, was sent for to attend him. There is no suggestion that there were not competent physicians at New Bedford. Green did what any person of wealth would do if taken seriously ill while on his summer vacation. He sent back home for his family physician to come and attend him.

The failure of the Special Master to find that on different occasions when Green was taken seriously ill at Round Hills his family physician in New York City, Dr. Henry S. Pascal, was sent for and attended him at Round Hills is the basis of Exception No. 35.

There has been much ado because of the fact that Green did not enter Massachusetts until the first day of July during most of the years that he spent the summer there, and never remained as long as six months. An attempt has been made to create the impression that Green would have spent more time in Massachusetts and would have made it his permanent home if he had not been of the belief that if he came into Massachusetts before July first, or remained for more than six months, he would have been subject to taxation there on his income. Facts are stubborn things and the fact is that Green never was in Round Hills except during the summer and fall. There is no contention by any one that, as a matter of law, Green would have been subject to income taxation because of going into Massachusetts before July first, or because of remaining there more than six months, and there is likewise no suggestion that Green did not know and understand the law. His personal attorney, Charles W. Pierson, advised him in January, 1918, that the word "inhabitant" as used in the Massachusetts income tax law meant a person legally domiciled in Massachusetts and that he was not taxable under said law, although he spent part of his time at his "Round Hill Farm." In 1920, a change in the Massachusetts income tax law struck out the sentence "Every person who is an inhabitant of the commonwealth between the first day of January and the thirtieth day of June, both inclu-

sive, in any year, shall be subject to the taxes imposed by this act." Thereupon, as Green had frequently asserted that because of this provision he could not stay in Massachusetts longer than six months, his local counsel in New Bedford, John M. Bullard, advised him that whatever restriction there might have been upon his movements had been removed. Bullard even suggested that he might like to come to Round Hills earlier. Notwithstanding this change in the law, Green continued to come to Round Hills on July first in 1930, 1931, 1932, and 1933 as he had done consistently since 1921. In 1934 he came there on June twentieth, and in 1935 on June eighteenth. In the two latter years, Green was avoiding New York City because of the law suits.

Th embarrassment of the proponents of a Massachusetts domicile because of the fact that Green spent only his summers in that state can be understood. Their attempt, to cover this up by attributing to him a motive that did not exist, for not spending more time there is visible evidence of the weakness of their case and shows the extremes to which they have been put.

Exception No. 36 is to the failure of the Special Master to find that Green has been advised repeatedly, both by his personal general attorney, Charles W. Pierson, of New York City, and his local Massachusetts counsel, John M. Bullard, of New Bedford, that, so far as Massachusetts income taxes were concerned, it made no difference if he spent less or more than six months of the year in that state.

More eloquent than any other single fact in the case to show that Green did not acquire a Massachusetts

domicile is the action of the taxing authorities of the Commonwealth with respect to his income taxes.

According to the finding of the Special Master, Green became domiciled in Massachusetts in 1921. There was no secret about his manner of living or about when he came to and left that State or about what he did there. The newspapers there were full of stories about him and he was regarded as good copy by special writers as well as by the everyday reporters. He had a flare for publicity. The facts about his life were recorded in books and magazine articles. There was and could be no excuse for lack of knowledge on the part of the taxing authorities concerning him.

In 1928 the Commonwealth of Massachusetts undertook an investigation to determine whether or not that State was his domicile. It did not entrust so important a proceeding to a junior official or even to an associate executive. The Commissioner of Corporations and Taxation, Henry F. Long, personally took charge of it. Mr. Long is no novice in the field of taxation. He is an attorney at law and has held the office of Commissioner of Corporations and Taxation which he now holds, since 1920. He is a former president of the National Tax Association, a former president and the most active member of the New England Tax Officials Association and is regarded throughout the Nation as an expert on taxation. He knows the law of domicile. He knew also that if Green was domiciled in Massachusetts his income tax would represent a substantial annual increment to the Treasury and it was his duty to enforce the payment of income taxes by Green if he was so domiciled.

The investigation with respect to Green's domicile by the taxing authorities of Massachusetts reached its climax when, on November 27, 1928, Commissioner Long journeyed to Round Hills for a personal interview with him. He suggested to Green that he had information indicating that Green was subject to income taxation in Massachusetts and informed him that it was common knowledge that he was there a good portion of the year and that the people of Massachusetts looked upon him as one of them, and said that he was considering seriously holding him to be a resident of Massachusetts. Green responded with the hackneyed and much advertised statement that his legal residence was Texas, a statement which by the furthest stretch of the imagination could not have been unknown to the astute and experienced head of the taxing machinery of Massachusetts to be false.

We have the right to assume that Commissioner Long did not neglect his duty but that he made a thorough investigation of all of the facts and circumstances that might indicate a Massachusetts domicile. If he had concluded as the result of such investigation that Green was domiciled in Massachusetts, it was his duty under the law to take steps to levy assessments against him and to enforce the collection of the same. The Commissioner's inaction is ample evidence of his findings. He made no assessment against Green at any time and took no action of any kind looking to the enforcement of any income tax, despite the fact that a two year statutory limitation barred him from enforcing taxes for a longer period. No importance attaches to the mailing of a notice to file an income tax return to Green, which did not reach him during his lifetime

but was delivered to his financial representative subsequently to his death. The purpose of this seems obvious.

The sum and substance of the action taken by the taxing authorities of Massachusetts in regard to imposing an income tax against Green is a determination that he was not domiciled in the Commonwealth.

Exception is taken to the failure of the Special Master to find that it was Commissioner Long's duty to enforce the income tax law of Massachusetts (See Exception No. 37), and also to his failure to find that no assessment for income taxes was ever made against Green by that State (See Exception No. 38).

It is proper for the Court to give weight to the fact that Massachusetts did not challenge Green's claim of nonresidence or contest the issue when the 1928 investigation of his domicile was made.

Cooper's Administrator v. Commonwealth, 121 Va. 338.

The mere failure of Green to file an income tax return in Massachusetts is evidence of an intention not to be domiciled there.

Matter of Lydig, 191 App. Div. 117, *supra*.

Much stronger evidence of his intention is shown by the fact that he affirmatively denied being a resident there, and the taxing officials of the Commonwealth, after a complete investigation, determined that he was not a resident.

The Special Master, at page 42 of his Report, finds as a fact indicating a Massachusetts domicile that "In 1915, he had his yacht 'United States' taken out of the State to avoid taxes." The year 1915 was a typographical error and has been corrected by the Special Master. It should have been 1919. The greater error in this finding, which will have to be corrected by this Court, is the improper use of the fact it states to bolster up the case for Massachusetts. The manner in which the fact is used in the Report creates a wholly false impression. The taking of the yacht out of Massachusetts to avoid taxation thereon had nothing whatsoever to do with Green's being domiciled in Massachusetts. The taxes sought to be avoided were those that would have been levied against the yacht as tangible personal property within the State owned by a nonresident. If Green had been a resident of Massachusetts, the yacht would have been taxable there without regard to whether it happened to be physically within the State on the day of taxable status. This point is covered by Exception No. 56.

Another instance in which the Report of the Special Master is misleading and erroneous is at page 38, where the statement appears that "Mrs. Stafford, who had made her home with them in New York, lived at Round Hills each year from 1920 to 1927." If this statement were so phrased as to state that Mrs. Stafford spent portions or all of the summer with the Greens at Round Hills each of those years, it would not be objectionable. The trouble is that it conveys the erroneous impression that Mrs. Stafford made her home at Round Hills.

Her testimony on this point was as follows (Record, 5070):

"Q. Now, how long did you make your home at the Waldorf-Astoria Hotel with Colonel Green?
A. From the time, from May of '18 until '27.
Q. Yes. And I think you told me when I talked with you that wherever Colonel Green's home was your home was?
A. Yes."

Exception to the finding of the Special Master last referred to constitutes Exception No. 50.

Reference has been made to the giving up by Green, long prior to his death, of his memberships in Massachusetts social organizations. Further evidence of a lack of domiciliary intention by him toward Massachusetts is shown by the fact that he discontinued his contributions to the New Bedford Community Welfare Fund after 1928, although he had contributed for many years previously. This is covered by Exception No. 40.

The Special Master failed to find that Green's name was never on a jury list at South Dartmouth, Massachusetts, which is additional evidence that he was not domiciled there (See Exception No. 41).

Of prime importance on the question of Green's intention is the fact that subsequently to 1921, the year in which the Special Master found that he became domiciled in Massachusetts, he specifically denied on numerous occasions that he was a resident of that State (See Exception No. 42).

Disavowal of an intent to make a place where one actually resides during portions of the year his domicile is to be given weight in determining where the domicile is.

Givernaud v. Variel, 86 N. J. Eq. 80, affd., on opinion below, 87 N. J. Eq. 654.

The Record fails to justify the statement by the Special Master, at pages 41 and 42 of his Report, that all of Green's personal and intimate belongings remained at Round Hills until his death. Wherever he journeyed he carried with him a great many trunks containing his personal belongings (R. 21). All of his mother's letters to him, his most intimate tie to her, and the major portion of his stamp collection, which constituted his principal hobby, were kept in New York City until his death. Other of his belongings of a personal and intimate nature were kept both at Star Island and at Round Hills. (See Exception No. 55.)

The statement contained in the Report of the Special Master at page 42, to the effect that Green never openly acknowledged Round Hills as his legal residence, invariably giving as his reason that he wished to avoid paying taxes there, is improper and misleading. It implies that Green secretly acknowledged Round Hills as his legal residence, an implication that is in no way justified by the Record. Green never acknowledged any place other than Texas to be his legal residence. He always insisted that Massachusetts was not his legal residence and said that he would not make it his legal residence because of its tax laws and for other reasons. (See Exception No. 57).

The statement at page 34 of the Report of the Special Master, that there is nothing in the correspondence between Green and his attorney, Charles W. Pierson, of New York City, indicating that he ever regarded himself as a resident of New York, is subject to the same criticism as the statement referred to in the preceding paragraph. It would hardly be expected that Pierson, shrewd lawyer that he was, would write Green that his residence was in New York when he well knew that Green's claim was that he was a legal resident of Texas; much less would Green write Pierson to that effect. The statement unduly and improperly colors the findings to the prejudice of the Respondent, The State of New York. There was nothing in the correspondence between Green and Pierson indicating that he ever regarded himself as a resident of Massachusetts or Florida or any other state, except Texas (See Exception No. 66). The Special Master should have so found, if any finding at all on the subject were deemed appropriate.

Subject to similar criticism is the statement on page 34 of the Report of the Special Master that "In a sworn statement to the taxing officials of New York, he declared that he was not and never had been a resident of New York" (See Exception No. 67). It is incomprehensible that the Special Master should adopt such a reason for finding against a New York domicile when the Record teems with instances where Green declared, under oath and otherwise, that he was not a resident of Massachusetts, and particularly when the declaration was made to escape taxation in New York and was a part of an affidavit that contained obvious untruths. The sole purpose of the statement was to

create evidence in favor of the declarant and it is entitled to no weight. The Special Master's use of this declaration against New York and in favor of Massachusetts is on a par with his use against Florida and in favor of Massachusetts of a statement made by Green in testimony given in 1935 that he was a resident of Texas and a statement made by Green to the Tax Assessor of Dade County, Florida, that his residence was in another state (without specifying what state). (See Report, pp. 47-8.) The fact that Green claimed his residence to be in Texas must be as valid to disprove a Massachusetts domicile as to disprove a domicile in either New York or Florida.

At page 52 of his Report, the Special Master states that after 1921 Green's declarations that he had a legal residence in Texas were made to the taxing officials of New York, Massachusetts and Florida, for the purpose of escaping taxation in those jurisdictions. This statement is inaccurate as there is no evidence that he made any declarations to the New York taxing officials after 1921. The only statements the evidence shows that he made to New York taxing officials were those which he made in 1916. The statement also improperly colors the opinion as it implies that Green kept his legal residence in Texas until 1921 and that his statements that he had a legal residence in Texas were not false until after 1921. The difficulties inherent in reaching a conclusion that Green became domiciled in Massachusetts in 1921 are appreciated, but such an indirect method of attempting to substantiate the conclusion is not warranted.

In *Estate of Harkness*, 176 Cal. 537, *supra*, it was held that the fact that a person in "swearing off" his

personal property taxes in New York City, alleged that he was a resident of California did not establish that his residence was in that State and the further fact that he stated that he was temporarily sojourning in Kentucky did not prove that Kentucky was not his domicile.

The Special Master, at page 35 of his Report, finds that from 1918 to 1921 the development of the Round Hills property was Green's principal occupation. Nothing could be further from the fact. From 1918 to 1921 Green was engaged in the same activities in New York City that had occupied him since he came there in 1911. During each of those years he was in Massachusetts only three and a half months and spent nearly all of the remainder of the year in New York City. When he was at Round Hills and vicinity he made weekly trips to New York to attend to his business affairs. (See Exception No. 68.) The Special Master himself states (R., p. 29): "This period from 1911 to 1921 was the most active of Green's business career."

At page 36 of his Report, the Special Master finds that Green stated that if he survived his sister, Mrs. Wilks, he would have the entire ownership of the Round Hills property and, if she survived, she would own it as residuary devisee under his will executed in 1908. The purpose of this finding is not too clear, unless it be to circumvent and deprecate the clearly established fact that Green did not own the Round Hills house but only had an undivided one-half interest in it, which is wholly consonant with the use of it as an institution but inconsistent with its having been constructed by him primarily as a home. The Record does not support the finding (See Exception No. 69).

This case is extraordinary for the reason that neither Green's widow nor his sister were called as wit-

nesses. They are the two living persons who should know most about his life and his intention with regard to domicile. When the Special Master, at page 48 of his Report, states that Mrs. Green and Mrs. Wilks "have been able to give but little aid in the solution of this problem," he probably does not intend to infer that they might not have been able to aid if they had been called as witnesses. New York was not in position to call them as Mrs. Green had shown by her answer in this case and her position in the proceeding for the probate of her husband's will that she was pro-Texas (R. 48), and Mrs. Wilks is a party to this proceeding adverse to New York (R. 49). It will be noted that the Special Master in his Report, at page 49, sets forth that Mrs. Wilks in the New York probate proceeding denied that her brother was a resident of Texas, but made no reference to the fact that she there took the definite affirmative position that he was domiciled in New York before he was alleged to have become domiciled in Massachusetts. She is residuary legatee under her brother's will and a finding that he was domiciled in New York would have cost her nearly $2,000,000 more than if he was found to have been domiciled elsewhere, as personal income taxes to the amount of $920,827.35 have been assessed against Green as a resident of New York State, covering the period from 1919 up to the time of his death (See Exception No. 17), and the rates of the New York State estate tax are higher than those of any of the other states. Had Mrs. Wilks testified, she could have told what understanding, if any, she had with her brother in relation to Round Hills and could have cleared up many points that remain shrouded in doubt. The order of this Court referring the case to the Special Master appears to have been broad enough to have

warranted him in insisting upon the testimony of these witnesses. He was authorized "to take such evidence as may be introduced and such as he may deem it necessary to call for." Even if it found support in the Record, there would be no excuse for a finding that Green said Round Hills would be his if his sister predeceased him, when it was possible to call Mrs. Wilks and ascertain the true facts, particularly when the Record establishes so clearly that Green was somewhat akin to Gulliver as a romancer.

The following statement by the Court in *Commonwealth ex rel. Fortney v. Bobrafskie*, 329 Pa. 44, 47, a domicile case, is particularly appropriate here:

> "It is significant, however, that no member of his family—his wife and mother-in-law, who live in the ninth ward, on the one hand, and his mother and brother, who reside in the seventh, on the other—was called to testify for appellant. These were the persons most closely acquainted with the details of appellant's daily life."

An instance where the testimony of Mrs. Green would have been very helpful is in connection with the statement of the Special Master, at page 56 of his Report, that Mrs. Green looked forward to the time when she might be left alone and had selected a site and considered plans for a small cottage on the South Dartmouth estate, which were never carried out. Mrs. Green could have told whether or not there were any such plans but the Record leaves us uninformed. The Special Master's statement is speculative and prejudicial to New York. It has no place in the Report (See Exception No. 72).

It is elementary that the choice of a domicile made by the personal representative of a decedent, or by attorneys acting in behalf of the personal representa-

tive, or by one interested in the estate who would benefit from the choice, has no effect in determining domicile. The fact that Mrs. Wilks and her attorneys have selected Massachusetts cannot be given weight. This thought is accentuated when it is considered that Mrs. Wilks and her attorneys in the New York proceeding for the probate of Green's will took the definite position that he had become domiciled in New York, whereas in this proceeding they have avoided such a commitment. This may have been due to the fact that in the probate proceeding it was to their advantage to have Green domiciled in New York previous to taking up his alleged domicile in Massachusetts, whereas in the present proceeding they realized that it would not be possible to overcome the presumption in favor of the continuance of a New York domicile if that were conceded or established.

From the time Green moved to New York until the last three years of his life, when he was an involuntary exile from that State, no matter where he went he always returned to New York. The Special Master should have made a finding to that effect as it has an important ring upon the question of domicile (See Exception No. 18). It is proof of the *animus revertendi*. Opportunities to give up and abandon his New York domicile were plentiful. He never chose to do so.

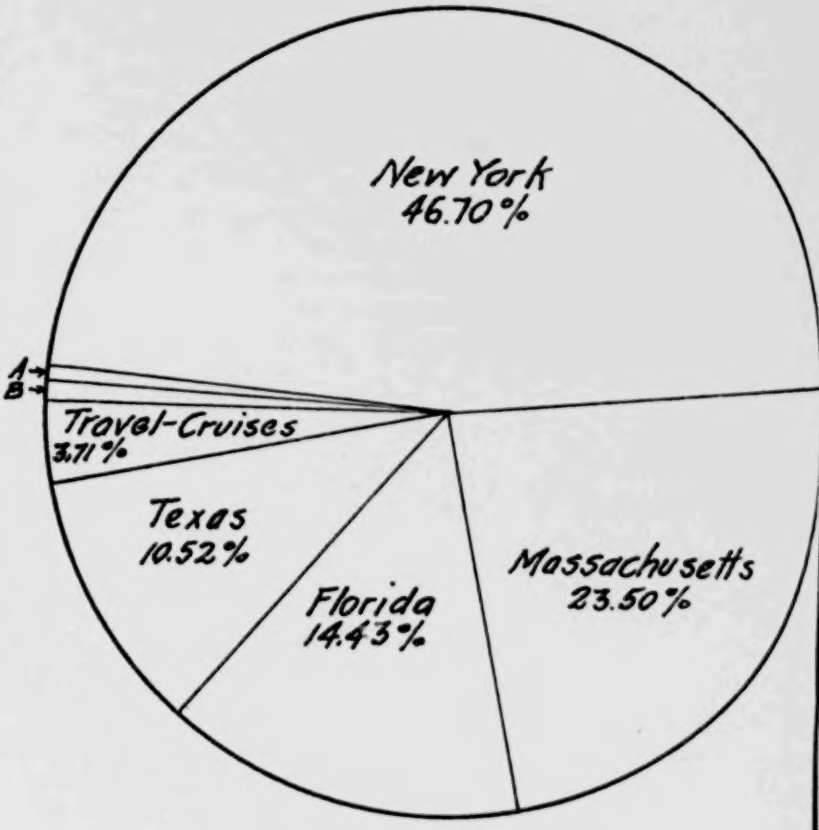
Summarizing briefly, Green came to New York in 1911 and spent all his time there until 1918, except for short visits to Texas and other points. In 1918 he began to spend his summers in Massachusetts but continued to spend most of the year in New York. The completion of the Round Hills house in 1921 brought about no change in his routine. Except for a visit to

Texas after his return to New York in that year, he remained in New York until July, 1922, when he went to Massachusetts again for the summer. Upon his return to New York in the fall of 1922, he again spent the winter in New York until, in the fore part of March, 1923, he was ordered by his personal and family physician, Dr. Pascal, to seek a warmer climate on account of his health. It is important to note that the physician's advice was that it would be necessary for him to spend his winters in the South or a warmer climate, not just the unexpired portion of the winter of 1923 (See Exception No. 43). Of the highest significance is the fact that after Green commenced his trips South his attitude toward Round Hills and the routine of his visits there did not change. It was still the summer home, staffed by summer help. After his first trip to Florida in 1923, he spent no more time at Round Hills than he had previously. If he had continued to spend the entire winter and spring in New York after 1923 there would probably never have been a question but that he continued to be domiciled in that State. Surely, it made no difference, so far as Massachusetts is concerned, that instead of spending his time in New York he divided it between New York and Florida.

46.70% of Green's time from January 1, 1910, to June 30, 1933, after which latter date he was compelled to remain outside the State, was spent in New York. This is almost double the amount of time he spent in Massachusetts, the percentage for that State being 23.50. Florida claimed 14.43% of his time, Texas 10.52% and the balance was spent in other places.

The time spent in the different States is graphically shown by the following diagram:

Period Jan. 1, 1910 to June 30, 1933.



A- North Carolina 0.41%
B- Doubtful 0.73%

In terms of days, Green's time between January 1, 1910, and June 30, 1933, was divided as follows:

New York	4008
Massachusetts	2017
Florida	1238
Texas	903
Scattering	416

After 1923, Green wintered in Florida on house boats until, in 1927, he moved into the new home he had built at Star Island, Miami Beach. From then on until his death he spent his winters in this home.

Judged by every criteria, the Star Island house was of the home type, as distinguished from the institution Green had erected at Round Hills. It had all the characteristics of a home. The premises were private and the public was bidden to stay off. The furnishings were sumptuous. Like the Round Hills house, Star Island could have been used for year round occupancy, but was never so used. Although the Special Master correctly indicated that Star Island was a winter home in the ordinary sense of the term when he said, at page 47 of his Report: "Everything he did indicated a seasonal vacation and relaxation from physical and mental effort," he failed to make such a finding. It was so regarded by Green and his friends and associates and was never intended to be his domicile. Exception No. 44 covers this point.

Upon all of the evidence, if a choice between two seasonal homes should become necessary in order to determine the domicile there should be no hesitancy in deciding in favor of Florida. The Special Master indicates this, despite his finding for Massachusetts, when

he says, at page 54 of his Report: "Doubtless those who have visited both Round Hills and Star Island would prefer to live at the latter place, where there is every convenience, almost perpetual sunshine and a homelike atmosphere."

Actually, neither Round Hills nor Star Island became the domicile because Green never abandoned the domicile he had established in New York. Proof of the *animus manendi* is lacking with respect to both the Massachusetts and the Florida residences.

Certain exceptions have been taken to the findings and statements of the Special Master in regard to the Star Island residence and Green's activities there.

At page 45 of his Report is a finding that the Star Island house contained no library, no framed pictures or mementoes of his ancestors or articles of a sentimental nature or personal associations as at Round Hills. On the contrary, there was a library at Star Island and there were pictures and other articles of a sentimental nature and of personal associations (See Exception No. 73). A whaling ship and mementoes of the whaling industry would have been out of place in the waters of Biscayne Bay.

At page 47 of his Report, the Special Master finds that Green never conducted in Florida any of the activities or experiments which occupied him in Texas and Massachusetts. This finding is not supported by the evidence. As has been pointed out, the Star Island place was of an entirely different character than Round Hills and Green's health had changed ma-

terially when he commenced his activities at Star Island from what it had been when he was in Texas, New York and Massachusetts (See Exception No. 74). In Florida, he was interested in radio, moving pictures, aeronautics, yachting, television, stamps, numismatics, jewels, jig saw puzzles, etc.

The finding of the Special Master, at page 55 of his Report, that Green's personal counsel, Charles W. Pierson, in 1931 and again in 1933, advised him to formally adopt Florida as his legal residence is wholly unsupported by the evidence. All that Pierson said to him on the subject was that, if Texas should pass an income tax law, he should consider changing his legal residence to Florida. Texas never passed an income tax law and Pierson never advised Green to adopt Florida as his legal residence (See Exception No. 75). Even if the finding were supported, it is difficult to see how it would prove either that Massachusetts was Green's domicile or that Florida was not. The Special Master concedes that Green's claim to a Texas domicile was specious—what difference would it have made if Pierson had advised him to give it up and Green had refused.

The evidence clearly establishes that during the latter years of his life, Green devoted his activities to building up Star Island while his interest in Round Hills declined, and the Special Master should have made a finding to that effect (See Exception No. 45). This was in accordance with Green's habits. His interests constantly shifted in respect to all of the things in which he was interested, including radio, photography, aviation, scientific research conducted by the

Massachusetts Institute of Technology, and the Round Hills plant in general.

Exception is taken to the statement on page 17 of the Report of the Special Master, which reads as follows:

> "The defendants all proceed upon the theory that what happened prior to the time when Green moved into his several places of abode is not material and only of historical interest and that the place where he had his principal, predominate habitation and permanent home at the time of his death was his domicile regardless of the past, * * *."

The Special Master suffered under a serious misapprehension as to the legal theory of the Respondent, The State of New York. New York's position is that what happened prior to the time Green acquired his summer home in Massachusetts and his winter home in Florida is of the highest importance in the determination of his domicile (See Exception No. 76). This will be fully developed in the argument which is to follow.

New York also excepts to the conclusion of the Special Master, at page 57 of his Report, that the domicile of Green at the time of his death June 8th, 1936, in fact and in law, was in the Commonwealth of Massachusetts, claiming that he was domiciled in the State of New York at the time of his death (See Exception No. 77).

Discussion of legal principles which fix Green's domicile in the State of New York at the time of his death.

The Special Master in his Report sets forth two theories of the law of domicile, viz.,

1. The earlier home theory, which is to the effect that where a person has two or more homes his domicile is in the earlier home unless another is clearly proven to be the principal home, *animo et facto*, and

2. The principal home theory under which the domicile of a person having more than one home is determined by ascertaining which is the principal predominant habitation and permanent home regardless of the past.

The Special Master states that he had not adopted either of these theories to the exclusion of the other, but has followed both and obtains the result that the domicile was in Massachusetts (R. 18).

It is the contention of the Respondent, The State of New York, that the earlier home theory is the correct theory to be followed in the determination of Green's domicile at the time of his death and that under this theory his domicile was in New York, not Massachusetts.

There is a sharp division of judicial opinion with respect to the two theories of domicile above referred to. The overwhelming weight of authority in the older cases favors the earlier home theory. The principal home theory is of recent development, the leading case favoring it being the decision by the Supreme Court of Pennsylvania in *Matter of Dorrance*, 309 Pa. 151. The authority of the Pennsylvania decision is

seriously impaired by the fact that the New Jersey courts, in the same case, applied the earlier home theory and reached the conclusion that Dorrance was domiciled in New Jersey, despite the fact that the Pennsylvania court, under the principal home theory, had found his domicile to be in that State, *In re* ~~of~~ Dorrance, 115 N. J. Eq. 268, *supra*, affd. 13 N. J. Mis. Rep. 168, affd. 116 N. J. L. 362.

The conflict between the two theories is made clear by contrasting the opinion of the Pennsylvania court in the *Dorrance* case with the opinion of Surrogate Foley of New York County in the *Henry C. Frick* case (*Matter of Frick*, 116 Misc. 488, *supra*). Although the Surrogate's Court of New York County is not an appellate court and the decision in the *Frick* case was not appealed, counsel do not hesitate to cite that case, in view of the fact that it is well recognized that Surrogate Foley is not only an outstanding jurist but, because of the many domicile cases coming before his court, is a specialist in that field.

In the *Frick* case, to the facts of which reference has heretofore been made, there was no doubt at all but that under the principal home theory Frick's domicile was in New York where he had occupied the Vanderbilt house on Fifth Avenue from 1905 until 1914, when he moved into a new mansion which he had erected for himself at Seventieth Street and Fifth Avenue. Judged by all of the standards the Special Master has applied in reaching his determination that Massachusetts was the domicile of Green, New York was Frick's domicile. Like Green, Frick was a nomad and divided his time between Pittsburgh, Philadelphia, New York, Pride's

Crossing and various summer and winter resorts. The time he spent in New York continued to increase from year to year, and he lived in New York for the greater part of many years prior to his death. He maintained an office for all his business activities in Pittsburgh and his large investments were managed there. He made only occasional visits to Pittsburgh. Surrogate Foley gave no consideration to the principal home theory but decided that Frick was domiciled in Pittsburgh at the time of his death because there had never been a union of residence and intention that would have effected a change of his domicile from Pittsburgh to New York. In other words, he held that Frick never abandoned his Pennsylvania domicile. He said (pp. 492-3):

> "To effect a change of domicile there must not only be a change of residence, but an intention to abandon the former domicile and acquire another as the sole domicile. Intention only will not do it, but the two *(animus et factum)* taken together do constitute a change of domicile. *Dupuy v. Wurtz, supra.* See, also, Gleason & Otis Inheritance Taxation, 214; *Matter of Lydig,* 191 App. Div. 117.
>
> "Domicile may exist without actual residence, but it can never exist without intention. *United States Trust Co. v. Hart,* 150 App. Div. 413, 417, citing *de Meli v. de Meli,* 120 N. Y. 485. Nor is long continued absence from the domicile an indication of abandonment so long as the intention to return exists. Length of residence elsewhere does not effect a change. *Matter of Blumenthal,* 101 Misc. Rep. 83; affd., without opinion, 186 App. Div. 944; *Curtis v. Curtis,* 185 App. Div. 391; *Matter of Harkness,* 183 *id.* 396; *Matter of Mesa y Hernandez,* 172 *id.* 467; *People v. Platt,* 117 N. Y. 159; *Matter of Chadwick,* 109 Misc. Rep. 696. Here proof of Mr. Frick's intention to reside perma-

nently in New York is utterly lacking. His home in Pittsburgh was maintained by a staff of servants up to the time of his death. The establishment of a separate dwelling in another state, and the relative size or magnificence of the various houses conducted by Mr. Frick are not tests of his change of domicile. If so, the establishment of a summer residence in Massachusetts in 1902, antedating the acquisition of his first New York residence, would have effected a change of domicile from Pennsylvania to Massachusetts. The maintenance of each of the independent dwellings in New York City and Pride's Crossing did not supplant, but paralleled the continuation of his domicile at Pittsburgh."

(A superficial reading of the foregoing quotation might lead to the impression that the case is authority for the proposition that Green remained domiciled in Texas until his death because he never voted elsewhere and always declared his intention to retain his domicile there, but this would overlook the fact that Frick continued to have a home in Pittsburgh whereas Green gave up his home in Texas in 1911 and never thereafter had a home of any character in that State. Green, by his actions, indicated his intention to change his domicile to New York. After the change was effected, his claim to Texas domicile was a sham.)

In the *Dorrance* case, the decedent had been domiciled at Cinnaminson, New Jersey, for many years prior to 1925, at which place his business of making soup was centered. In 1925 he purchased a house at Radnor, Pennsylvania, outside of Philadelphia, and caused it to be made into an elaborate residence, much larger, more expensive and pretentious than the old home at Cinnaminson. After the Radnor residence

was acquired, Dorrance occupied it by far the greatest part of the time, although he made European trips and took summer vacations. His subsequent occupancies of the Cinnaminson residence were comparatively few and of short duration. The Pennsylvania court concluded that Dorrance had evidenced his intention to abandon his New Jersey domicile and to acquire a new one in Pennsylvania. It seemed to recognize the fact that the *Frick* case was an authority *contra* and sought to belittle that case on the ground that it was a decision of a lower court.

The fallacy of the reasoning of the Pennsylvania court could not be better exposed than it was in the opinion in the *Dorrance* case, as reported in 115 N. J. Eq. 268, where it was said (pp. 275-6):

> "We have, in the present case, this situation: that Dr. Dorrance had a residence at Cinnaminson, New Jersey, which he occupied for many years and where he unquestionably was domiciled at and prior to 1925; the assertion (in the Pennsylvania proceeding and in this appeal) that he changed his domicile to Radnor, Pennsylvania, in 1925; the necessity that the truth of that assertion be proven by the weight of evidence; and the necessity of proving not merely that he then changed his residence in fact, but that he did so with the intention of abandoning his domicile in Cinnaminson and with the intention that the house at Radnor should thereafter be his permanent home.
>
> "The appellants (and the Pennsylvania court) rely on the facts that Dr. Dorrance purchased the Radnor house and improved it with the intention of using it as a residence or home for himself and his family; that it was far larger, more expensive and pretentious than the old home at Cinnaminson; that he thereafter—except for European trips

and summer vacations—occupied it by far the greatest part of the time (and his family even more so); that his subsequent occasions of occupancy of the Cinnaminson residence were comparatively few and of short duration (the occupancy by his family even fewer and shorter); that from and after November, 1925, the Radnor house was in fact the real residential home of himself and his family.

"All this must be conceded; it is fully established by the evidence. All this, however, goes only to the *fact* of residence; it is equally necessary to prove *intent*—to prove that in moving into and occupying the Radnor residence as a residential home, he did so with the intention of occupying it as a permanent home and abandoning the Cinnaminson residence as a home.

"The appellants (and the Pennsylvania court), assert that that intention is proven—that it is a necessary inference from the facts stated; but their argument goes but little beyond that mere assertion. Their argument is concentrated on the effort to show that from and after 1925 the house at Radnor was in fact the real and actual home of the Dorrances and the house at Cinnaminson a mere country house occasionally and briefly visited. Their contention is that the establishment and occupancy of the Radnor house as an actual home proves that there was an intention that it should be his permanent home and that there was no intention of returning to the Cinnaminson house as a home.

"This is an obvious *non sequitur*, and it disregards a great mass of evidence relevant and material on the question of intent, evidence which, in the judgment of this court, clearly establishes an intent quite the contrary, an intent not to abandon the Cinnaminson home, an intent that the Radnor house was to be a home only temporarily and that the Cinnaminson house was to be returned to as a home.

"It is true, as the appellants urge (and the Pennsylvania court stresses), that the intention required for the acquisition of a domicile is an intention to make a home in fact, and not an intention to acquire a domicile. *Am. Law Inst., Restatement, Conflict of Laws, section 21.* If Dr. Dorrance had intended to make his residence in Radnor his actual home for all practical purposes for the rest of his life and intended to live no more in Cinnaminson, he could not retain his legal domicile in Cinnaminson; in such case his intent or wish to retain a technical legal domicile in New Jersey while actually making, and intending to make, his permanent home in Pennsylvania, would be unavailing. *Dickinson v. Inhabitants of Brookline,* 181 Mass. 195. 'A person's wish to retain a domicile in one country will not enable him to retain it if in fact he resides with *animus manendi* in another.' *Dicey, Conflict of Laws,* 106.

"No matter how much he may wish or strive to avoid that legal consequence, a man's domicile will follow him to his new home, if he establishes himself in a new home and intends that new home to be his permanent home. But that legal result will not follow, no matter how completely he establishes himself in a new home, if he does not intend the new home to be his permanent home—if he intends that it shall not be his permanent home.

"The law is thoroughly well settled and unquestioned everywhere that a man's domicile once acquired, remains until a new domicile is acquired, and that a new domicile is not acquired by moving to another residence unless he has the intention to make his new home permanently in the new residence. *Cadwalader v. Howell, supra; Watkinson v. Watkinson,* 68 N. J. Eq. 632; 60 Atl. Rep. 931; *Givernaud v. Variel,* 86 N. J. Eq. 80; 97 Atl. Rep. 49; affirmed unanimously, *sub nom. Plahn v. Variel,* 87 N. J. Eq. 654; 103 Atl. Rep. 1054; *Williamson v. Osenton,* 232 U. S. 619, where the United States supreme court says:

'The essential fact that raises a change of abode to a change of domicile is the absence of any in-

> tention to live elsewhere (*Story Confl. L.* §43); or as Mr. Dicey puts it in his admirable book, "the absence of any present intention of not residing permanently or indefinitely in the new abode. *Conflict of Laws* (2d ed.), 111." " "

The affirmances of this case by the higher Courts were substantially on the opinion from which the above quotation was taken.

It would be difficult to find two theories of law with respect to which the line of cleavage would be more marked than the earlier home and principal home theories of domicile, and it is respectfully submitted that if these two theories conflict the long and well established earlier home theory must be given precedence.

Applying the earlier home theory to the case at bar, it is found, first, that Green abandoned his domicile in Texas and became domiciled in New York and, second, that as long as he lived he always retained his home in New York. The evidence is insufficient to show an intention ever to abandon the New York home or to overcome the presumption of law that the New York domicile continued.

The language of the New Jersey Court in the *Dorrance* case may be paraphrased so as to make it applicable to the alleged Massachusetts domicile of Green in this case, as follows:

> "We have, in the present case, this situation: that Colonel Green had a residence at New York, New York, which he occupied for many years and where he unquestionably was domiciled at and prior to 1921; the assertion that he changed his

> domicile to South Dartmouth, Massachusetts, in 1921; the necessity that the truth of that assertion be proved by the weight of evidence; and the necessity of proving not merely that he then changed his residence in fact, but that he did so with the intention of abandoning his domicile in New York and with the intention that the house at South Dartmouth should thereafter be his permanent home."

By a change of dates and names, a like paraphrasing will make the statement applicable to Green's alleged Florida domicile.

The facts favoring New Jersey in the *Dorrance* case were somewhat similar to, but not as strong as, the facts favoring New York in this case.

In the *Dorrance* opinion, 115 N. J. Eq. 268, it was said (p. 280):

> "He continuously maintained the Cinnaminson house as a residence, open and fully equipped for occupancy at all times, and with a full staff of servants (whereas the Radnor house was sometimes closed and without servants); and both he and his wife and children came and stayed there at times, even though infrequently and for periods of not long duration."

Green's New York residence was the only one that he possessed that was open and fully equipped for occupancy at all times.

Another case which illustrates the application of the earlier home theory of domicile, and which is closely in point on the facts with the case at bar, is *Reed's Will*, 48 Ore. 500, *supra*, in which it appeared that S.

G. Reed had been domiciled in Portland, Oregon. In the year 1891, because of the failure of his health, and at the instance and upon the advice of his physician, he went to California to spend the winter, hoping that the change would benefit him. His health did not improve and he returned to Oregon in the spring of 1892, after which he went to Europe to consult a specialist. He returned from Europe in the fall of 1892 and shortly after his return, in company with his wife, went to Pasadena, California, where the climate was considered better suited to his health and comfort than that of Portland. They stopped at a hotel in Pasadena for a while and then purchased residential property and removed their household effects and personal belongings from Portland to Pasadena. Reed's health grew worse and he died in Pasadena in 1895, his body being taken to Portland for burial. During his absence from Portland, Reed made no material change in his business affairs, retained his residence property and his lands, investments and securities there, kept his bank accounts and deposits there, and retained his office there in charge of an agent who attended to his business. He also retained his connection as director in several Oregon corporations, his position as a member of the Water Committee of Portland, and his fraternal affiliations in Portland. He never voted in California nor assumed any of the duties or obligations of its citizenship, and paid no taxes on personal property there, except such, perhaps, as he used for his immediate comfort and convenience. Aside from his bare residence in California, Portland was the center of his affairs and they remained unchanged as to his business connection and civic obligations and duties.

He expressed in his will a desire that his wife, to whom he gave his entire estate, should devote some portion of it for the permanent benefit of the City of Portland. Reed's will was probated in Oregon as that of a resident of that State, and no question was raised concerning his domicile. After settling her husband's estate in Portland, Mrs. Reed returned to California and occupied the old residence there for a time, but two or three years later built another dwelling at Pasadena on property purchased by her husband and on which he had contemplated building. She continued to reside in this new dwelling until the time of her death, in May, 1904, although making frequent trips to Portland meanwhile. She made no change in the management of the business or the property, real or personal, to which she succeeded, except to have her husband's name removed from the office door and hers placed thereon. She retained her church connection at Portland, and kept her office, agent, bank account and deposits there, except a small amount from time to time to meet her current expenses. She described herself in documents and in her will as of Portland. Her will made bequests to various Portland institutions and one to a Pasadena institution, the main bequest commemorating her husband. It was held that Mrs. Reed was domiciled at Portland at the time of her death. In the opinion, Chief Justice Bean said (pp. 505-6):

> "Now, the principal fact upon which the contestants rely to show a change of domicile was the removal of the Reeds from Portland to Pasadena in 1892, and the residence of Mr. Reed there until his death three years later and Mrs. Reed's residence thereafter until her death in 1904. But residence alone is not sufficient for the purpose.

> Residence and domicile are not interchangeable terms. Domicile embraces more than mere residence. Residence denotes a place of abode, whether temporary or permanent; while domicile denotes a fixed and permanent home, and need not be the actual place of abode. It does not depend upon mere naked residence, but 'is the legal, the juridical seat of every person—the seat where he is considered to be in the eyes of the law, for certain applications of the law, whether he be corporeally found there, or whether he be not found there:' Jacobs, Domicile, §63. This distinction is clearly recognized in the authorities."

Other pertinent excerpts from the opinion follow:

> "Domicile, therefore, is made up of residence and intention. Neither, standing alone, is sufficient for the purpose. Residence is not enough, except as it is co-joined with intent, which determines whether its character is permanent or temporary and clearly a mere intent cannot create a domicile." (pp. 504-5.)
>
> "We are not so much concerned at this time with the correct technical definition of domicile as we are with the law regulating a change of domicile when once acquired. It is shown by the evidence and admitted by the contestants that Mr. and Mrs. Reed were domiciled in Oregon from 1854 to 1892—a period of nearly 40 years—and this domicile is presumed to have continued until it is shown that a new one was established, in intent and in fact, by indicating and carrying into effect an intention to abandon the Oregon domicile, and to establish another in California. Every person is assumed by the law to have one domicile and one only. And when this is shown to exist, it is presumed to continue until not only another residence and place of abode are acquired, but until there is an intention manifested and carried into execution of abandoning the original domicile and acquiring another by actual residence; and the burden of proof is upon the party who asserts the change." (p. 505.)

"A change of domicile, therefore, involves a question of fact and intent. The fact is easily proved because it is shown by the mere transfer of the bodily presence from the old to the new place of abode, but the intent with which the change is made is to be determined from the character of the residence, its object and purpose, in connection with the other evidence in the case." (p. 509.)

"But a residence for mere pleasure or health is not regarded as of any great weight in determining the question of a change of domicile, for, in such case it is just as likely that the party intends to retain as to abandon his present domicile. The books abound in cases where absences for 20, 30 and even 40 years effect no change of domicile." (p. 510.)

Green's residence, both in Massachusetts and Florida, was for pleasure and health, not business, and was not of that permanent character which standing alone will in law constitute an indication of the intention to change the domicile.

The Special Master, at page 35 of his Report, finds that from 1921 to 1936, Green's principal concern was his health and he was constantly seeking relief from the ravages of disease by "following the sun" and indulging in hobbies and outdoor activities where the climate permitted. Without doubt, this is a correct statement. It indicates that Green had no fixed abode either in New England or the South, and points conclusively to the continuation of his domicile in New York.

Among the cases cited by the Special Master in support of his conclusion of a Massachusetts domicile is

Matter of Trowbridge, 266 N. Y. 283, *supra*. This case is readily distinguished as an authority. It does not involve the earlier home theory, for the reason that Trowbridge had no home in New York for a long period prior to his death. His only home was in Connecticut. He did own a house in New York City in which he had formerly resided, but the house had not been occupied as a residence for years. The windows were boarded up, telephone service had been discontinued, and the furnishings and silverware had been removed to the Connecticut home. Trowbridge told his friend and neighbor that he had closed his town house and never expected to go back to it. He and his family lived in Connecticut exclusively. Green's New York residence was ready for his occupancy at all times and equipped not only with hotel telephone service but with private unlisted telephone service.

The gist of the decision in the *Trowbridge* case is found in the following statement by Judge Loughran, at pages 291-2:

> "General concepts or definitions of domicile need not now engage us. If at a given time a man exclusively makes his home with his family in a complete domestic establishment, intending so to occupy it for the rest of his days, the place of that habitation is then his domicile, no matter what he may say to the contrary. (*Matter of Roberts*, 8 Paige, 519, 523, 524; *Peterson v. Chemical Bank*, 32 N. Y. 21; *Dupuy v. Wurtz*, 53 N. Y. 556, 566; *Matter of Harkness*, 183 App. Div. 396.) We have just that case here. Concededly, Mr. Trowbridge actually lived only in his Noroton house for years before his death."

After the Round Hills house was completed, Green at no time exclusively made his home with his family

in a complete domestic establishment. Before then he did exclusively make his home in New York City and, for that reason, became domiciled there, which domicile was never changed.

The proof of absence of *animo revertendi*, and of the presence of *animo manendi*, must be much stronger in a case where the old domicile is retained as a residence and it is alleged that a change of domicile has been effected than in a case where residence at the old domicile has been abandoned.

The evidence does not establish the adoption of either Massachusetts or Florida by Green as a domicile by any of the accepted tests, such as voting, taxpaying, declarations, etc. Therefore, the domicile must, as a matter of law, remain in New York City where it was established in 1911.

In *Chambers v. Prince*, 75 Fed. 176, it was said (p. 177):

> "A party may be a resident of a place, and yet not domiciled there, for, while he is resident there, still if he does not intend to make that his permanent place of abode, but has always the '*animo revertendi*,' there can be no doubt that the mere fact of his residing for the time being in a place does not establish a domicile at the place of residence. A man always retains his domicile if he leaves it '*animo revertendi*.' "

As was said in *Hayes v. Hayes*, 74 Ill. 312 (p. 316):

> "To effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the

> intention of making the last acquired residence a permanent home."

In *Boyd's Exor. v. Commonwealth*, 149 Ky. 764, it was said (pp. 766-7):

> "One may have several homes, but can have only one legal residence. In this age of commercial and social activity, it is not unusual for one, whose circumstances in life permit, to live in the far south in the winter, in the north in the summer and at some intermediate point, during the other seasons. Thus, he has three homes, only one of which can be his legal domicile; and this is not changed, but remains the same until he elects to surrender his legal domicile and adopt another, in its stead."

The fact that Green was nomadic in his tastes, as stated by the Special Master at page 53 of his Report, supports the New York domicile. He never settled down anywhere else after his New York domicile was acquired and, therefore, never lost it.

In order for a person to acquire a new domicile both *factum* and *animus* must concur.

The principle just stated is illustrated by the opinion of this Court in *Mitchell v. United States*, 21 Wall. 350, *supra*.

Jacobs on Domicil, §136, states:

> "Residence of itself, although decisive of the *factum* necessary for a change of domicil, is decisive of nothing further, and even when long continued, although *per se* evidence of intention, will not supply its place. Residence is of little value if not united to intention, and is nothing if contradicted by it. Intention must concur with fact, and must clearly appear. On the one hand the shortest

residence is sufficient if the requisite *animus* be present, and on the other the longest will not suffice if it be absent."

In *Loveland on Bankruptcy*, 3d ed., 516, the rule is thus stated:

"The domicile of a person may be changed. To constitute a new domicile two things are indispensable: *first*, residence in a new locality, and, *second*, the intention to remain there. The change can not be made except *facto et animo*. Both are alike necessary. Mere absence from a fixed home, however long continued, can not work the change. There must be *animus* to change the prior domicile for another. Until the new one is acquired the old one remains."

In the leading case of *Dupuy v. Wurtz*, 53 N. Y. 556, it was said (p. 561):

"To effect a change of domicil for the purpose of succession there must be not only a change of residence, but an intention to abandon the former domicil, and acquire another as the sole domicil. There must be both residence in the alleged adopted domicil and intention to adopt such place of residence as the sole domicil. Residence alone has no effect *per se*, though it may be most important, as a ground from which to infer intention. Length of residence will not alone effect the change. Intention alone will not do it, but the two taken together do constitute a change of domicil."

In *Jopp v. Wood*, 4 De G., J. & S. 616, Lord Justice Turner said (pp. 621-2):

"But nothing is better settled with reference to the law of domicil than that the domicil can be changed only *animo et facto*, and although residence may be decisive as to the *factum*, it cannot, when looked at with reference to the *animus*, be regarded otherwise than as an equivocal act. The

mere fact of a man residing in a place different from that in which he has been before domiciled, even although his residence there may be long and continuous, does not of necessity shew that he has elected that place as his permanent and abiding home. He may have taken up and continued his residence there for some special purpose, or he may have elected to make the place his temporary home. But domicil, although in some of the cases spoken of as 'home,' imports an abiding and permanent home, and not a mere temporary one. * * *

"In considering cases of this description it must be borne in mind that the acquisition of a new domicil involves an abandonment of the previous domicile."

In *Miller v. Brinton,* 294 Ill. 177, it was said (p. 186):

"To effect a change of domicile it must be abandoned without any intention to return to it and a new domicile acquired in another jurisdiction with the intention of making it a permanent home."

In *Bruner v. Bunting,* 15 Va. Law Reg. 514, *supra,* it was said (p. 517):

"In Lindsay v. Murphy, 76 Va. 428, Judge Burks, quoting with approval from a previous opinion of our Supreme Court written by him, said:

" 'Residence, with no present intention of removal, constitutes domicile. Mere change of place is not change of domicile. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. To constitute a new domicile two things must concur—first, residence in the new locality; second, the intention to remain there. Until the new domicile is acquired, the old one remains; and whenever a change of

domicile is alleged, the burden rests upon the party alleging it. These principles are said to be axiomatic.'

"In a comprehensive note to Berry v. Wilcox, 48 Am. St. Rep. 711, the annotator shows by a strong array of authorities too numerous to be repeated here, that every person must for all purposes have a legal residence or domicile somewhere; that he can have but one; that a domicile once acquired continues to exist until another is acquired elsewhere; that to effect a change of domicile there must be an actual abandonment of the former one coupled with an intent not to return to it, and also a new domicile acquired at another place, which can only be done by the union of intent and personal presence; that mere change of dwelling place, however long continued, does not of itself constitute change of domicile; and that the burden of proving the abandonment of the old and the acquirement of the new is upon the party making the charge. (See also to the same general effect Pendleton v. Commonwealth, 110 Va. 229, decided at Staunton, Sept. 16, 1909, 65 S. E. 536.)

"Mr. Raleigh Minor, in his work on Conflict of Laws, at page 114 (Sec. 59), says:

" 'It must be observed that neither presence alone, nor intention alone will suffice to create a domicile of choice. Both must concur, and at the very moment they do concur the domicile is created. As it is sometimes expressed the *factum* (presence) and the *animus* (intention) must unite. And thereafter no change of locality alone (There being no change of intent), or, *vice versa*, no change of intention (there being no change of locality) will effect an alteration of the domicile of choice, which remains where it was, until the *factum* and the *animus* again unite.' "

In *Matter of Lyon*, 117 Misc. 189, affd. 200 App. Div. 918, the decedent owned houses in Greenwich, Connecticut, and Port Chester, New York. He actually

lived in Port Chester for twenty years prior to his death, leaving his Greenwich house in charge of a caretaker, but at all times claimed to be domiciled in Greenwich. It was held that he was domiciled in Greenwich at the time of his death. The difference between this case and the Trowbridge case lies in the fact that Lyon's Greenwich house was maintained as a residence in charge of a caretaker, whereas Trowbridge's New York house was abandoned as a residence.

In the opinion in the *Lyon* case reported at 117 Misc. 189, it was said (pp. 200-201):

> "Residence means living in a particular locality, but domicile means living in that locality *with intent* to make it a fixed and permanent home. In order to acquire a new domicile, there must be a *union of residence and intention.* Residence without intention, or intention without residence, is of no avail, etc. *Matter of Roberts*, 8 Paige, 519; *Cruger v. Phelps*, 21 Misc. Rep. 252, 261; 19 C. J. 393; *Duke v. Duke*, 70 N. J. Eq. 135; *Penfield v. Chesapeake R. Co.*, 134 U. S. 351, 357.
>
> "Residence and intention, *animus et factum*, go hand in hand. They must be both present to create the change of domicile. An intention to abandon the former domicile must appear. Either residence alone, or intent alone, is not sufficient. Gleason & Otis Inheritance Tax, p. 214; *Matter of Lydig*, 191 App. Div. 117; *Matter of James*, 221 N. Y. 242, 256; *Matter of Frick*, 116 Misc. Rep. 488; 19 C. J. 423, n. 39; *Plant v. Harrison*, 36 Misc. Rep. 649; *Frost v. Bristbin*, 19 Wend. 11. The naked residence in itself amounts to nothing, unaccompanied with evidence of the *animus. Isham v. Gibbons*, 1 Bradf. 68, 89. Long continued absence from the domicile is not an indication of abondonment so long as the *intention* to return exists. The length of residence elsewhere does not affect the change. *Matter of Blumenthal*, 101 Misc.

Rep. 83; affd. without opinion, 186 App. Div. 944; *Curtis v. Curtis*, 185 *id.* 391; *Matter of Harkness*, 183 *id.* 396; *Matter of Mesa y Hernandez*, 172 *id.* 467; *People v. Platt*, 117 N. Y. 159; *Matter of Chadwick*, 109 Misc. Rep. 696; *Matter of Frick*, *supra*; *Aetna National Bank v. Kramer*, 142 App. Div. 144. Mr. Justice Jenks of the Appellate Division of the second department in *Webster v. Kellogg Co.*, 168 App. Div. 443, also restates these principles."

In *Caldwell v. Pollak*, 91 Ala. 353, *supra*, it was said (p. 357):

"A domicil once acquired is presumed to continue until a change, *facto et animo*, is shown. It is presumed to continue, until another is acquired by actual residence with the intention of abandoning the former one. And the burden of proof lies on the party who asserts the change."

In *Succession of Steers*, 47 La. Ann. 1551, it was said (p. 1554):

"To change from one domicile to another there must be an intention to abandon the former domicile. A residence merely is not sufficient, as this may be for special purposes, such as for health, for recreation, for commercial purposes. The nature of the residence may rebut the presumption of the *animo manendi*."

In *White v. Tennant*, 31 W. Va. 790, it was said (p. 792):

"Two things must concur to establish domicile,—the fact of residence, and the intention of remaining. These two must exist, or must have existed, in combination. There must have been an actual residence. The character of the residence is of no importance; and, if domicile has once existed, mere temporary absence will not destroy it, however long continued."

In *Jain v. Bossen*, 27 Colo. 423, it was said (pp. 425-6):

> "When one has acquired a domicile, he must abandon it before he can gain another. To effect such a change, there must be both act and intention; in other words, there must be a severance from the old place with the intention of uniting with the new one, and these must concur. *Kellogg v. Hickman*, 12 Colo. 256.
>
> "A mere change of residence is not sufficient to acquire a domicile elsewhere, unless it is intended to be permanent. In all such cases it is the intention which is to control, so that a mere temporary absence for a temporary purpose does not result in an abandonment of a domicile. *Kellogg v. Hickman, supra;* 10 Ency. of Law (2d ed.) 600."

In *De Bonneval v. De Bonneval*, 1 Curt. 856, it was said (pp. 863-4):

> "Another principle is, that the acquisition of a domicile does not simply depend upon the residence of the party; the fact of residence must be accompanied by an intention of permanently residing in the new domicile, and of abandoning the former; in other words, the change of domicile must be manifested, *animo et facto*, by the fact of residence and the intention to abandon."

The Record is replete with specific denials by Green of *animus manendi* with respect to Massachusetts, an example of which is his statement to W. C. Vander when Vander was hired to become chief engineer at Round Hills. This was in November, 1929. Vander asked him if he would not be living at Round Hills the year round some day. Green replied: "No; there are certain reasons why I will never live here all the time." (Rec. 7131-2.) The testimony of the witness

Vander is inaccurately digested at page 342 of the Digest.

Another example is the statement made by Green to Van der Putten, the decorator who furnished the Round Hills house, that he intended to use Round Hills for a summer home during his lifetime. The Special Master has failed to include in the Digest the testimony by this witness at pages 4338-9 of the Record, which reads:

> "Q. Did the Colonel state to you what he intended to use it for during his lifetime?
> "A. For a summer home."

Another example is the statement made by Green to Ardolino, the architectural sculptor, at the time the Round Hills house was being built. Green said he wanted the sculptural work made much bolder than it had been originally designed because the building was not intended for a residence, but was intended for an institution. This testimony is inaccurately digested at page 200 of the Digest. Ardolino's testimony was:

> "A Mr. Zinn introduced me to Colonel Green and Colonel Green, direct to me, told me that he wanted that work much more bolder than what it was because it was not intended for a residence but it was intended for an institution, so we kept on working and working until we made it bolder as he wished to have it." (Rec. 7800).

Another example is the statement made by Green to Harry Neyland that Round Hills was constructed for other purposes than a home and he was using it until he had developed it for a memorial which he had intended to build for his mother and his ancestors (D. 199-200).

Even if it appeared that Green's intention with respect to Round Hills was doubtful, it would be necessary to resolve the doubt in favor of his New York domicile.

> "An *animus* which is in doubt is not controlling in law."
>
> *Matter of Wise*, 84 Misc. 663, 666.

See also:

> *Fisk v. Chicago, Rock Island & Pacific R. R. Co.*, 53 Barb. 472.

Mere residence by Green in Massachusetts or Florida was insufficient to transfer the domicile there. The Special Master has stressed the amount of time spent by Green in Massachusetts and Florida as compared with the amount of time spent by him in New York. As has been pointed out, when a computation is made covering a period of years it is found that Green spent nearly twice as much time in New York as he did in Massachusetts and more than three times as much as he did in Florida. The last three years of his life cannot be used as a criterion, as during that period he was purposely staying outside of New York in order to avoid the service of legal process. In the year 1930, Green spent roughly six months in Florida as compared with four months in Massachusetts. In 1931, he spent approximately five months in each of those States. In 1932, he spent less than four months in Massachusetts and more than four months in Florida. In 1933, he spent more time in Massachusetts than in Florida. In 1934 and 1935, his time in these two States was about equal. During these years, there was certainly no preponderance of time spent in Massachu-

setts. He occupied his summer and winter residences for about the same length of time.

It was held in *Commonwealth v. Harkness' Admr.*, 197 Ky. 198, that the fact that a person having several residences spends only a small portion of his time at that which is his domicile is unimportant and does not indicate that the domicile is elsewhere.

In *First National Bank v. Hinton*, 123 La. 1018, *supra*, it was said (pp. 1024-5):

> "The question of domicile is one of intention as well as of fact, and where, as in this case, it appears that a domicile has been acquired in another state, the parties seeking to show that it has been changed to this state must overcome the legal presumption that it has not been changed by positive and satisfactory proof of the establishment of a domicile here as a matter of fact with the intention of remaining here and of abandoning the former domicile. Cole v. Lucas, 2 La. Ann. 950; Succession of Franklin, 7 La. Ann. 408; Hymen v. Schlenker, 44 La. Ann. 116, 10 South. 623; Succession of Simmons, 109 La. 1095, 34 South. 101; Marks v. Bank, 110 La. 666, 34 South. 725; Ballard v. Puleston, 113 La. 239, 36 South. 951. The most that can be said of the proof in this case is that it shows that Mr. Hinton provided his family with two places of residence, and that since 1903 they have spent more of their time at the one place than at the other. There is absolutely nothing to show that in so doing it was his intention to abandon the 'domicile' that he had acquired in Mississippi or in the legal acceptation of the term, to acquire 'a domicile' in Louisiana."

In *Petition of Oganesoff*, 20 F. (2d) 978, *supra*, it was said (p. 980):

"When a residence or domicile is once acquired, it continues until a new one takes its place. It is not lost merely by temporary absence, or temporary residence elsewhere, though that may be continued for a period of years."

In *White v. Stowell*, 229 Mass. 594, it was said (p. 597):

"The question of a person's domicil is mainly a question of fact; a domicil once acquired is not lost until a new one is obtained. Mere temporary absence does not change it, and personal presence in a place, even for a protracted period, does not of necessity fix the domicil in that place. While actual residence is a circumstance tending to establish the place of domicil at the place of residence, it is not conclusive."

In *Kreitz v. Behrensmeyer*, 125 Ill. 141, it was said (p. 194):

"We have frequently held, that when a party leaves his residence, or acquires a new one, it is the intention with which he does so that is to control. Hence the shortest absence, if at the time intended as a permanent abandonment, is sufficient, although the party may soon afterwards change his intention; while, on the other hand, an absence for months, or even years, if all the while intended as a mere temporary absence for some temporary purpose, to be followed by a resumption of the former residence, will not be an abandonment."

See also:

Gould v. Gould, 235 N. Y. 14;

United States Trust Co. v. Hart, 150 App. Div. 413;

Matter of Kane, 93 Misc. 406, *supra*.

The precedence of the earlier home theory of domicile is recognized by *Beale* in his work on Conflict of *Laws* when he says (pp. 190-1):

"The true criterion, therefore, for determining the domicil where there are two homes, seems to be the determination of the order of acquisition of the two homes. The one which having been first acquired became a domicil remains the domicil, in spite of the establishment of the new home; and the second home, therefore, cannot be a legal domicil so long as the first one remains an actual home.

"This appears to be the doctrine applied, though not always clearly expressed, in most of the cases; therefore where one has a home and domicil established, and thereafter acquires a new residence, still maintaining his old home, it is not material whether the new residence is or is not a home, if it does not become his principal home; for whether a residence merely or a home, the domicil continues to be where it was in the past.

"A common example of the existence of two actual homes is the case of a person who has at the same time a home in the country which he occupies during a part of the year and a home in the city which he occupies during the remainder of the year. It has been often urged in such a case that the only home at any one time is the one of these two places which for the time the person is occupying; that he carries his *lares* and *penates* with him, and sets them up for the time being in the residence which he is then occupying. The better view, however, would seem to be that the two residences may have at all times the characteristics of home. Looking only at the owner's relation to one of them, he has left it temporarily, intending to return to it; a state of affairs quite consistent with his maintaining his home there. Throughout the year his thoughts may turn to either residence as home. Even though he should speak and think of one of them more enthusiastically than the other, this is not necessarily a proof that he regards it

predominantly as his home. 'The country house, being the place of recreation, is generally the object of the more exuberant expressions of attachment.' Under these circumstances, since the person has acquired each of his residences as a home and has never given up either permanently as the place of his home, he must be regarded as still actually at home, as distinguished from legally domiciled, in both. It would follow that if we find at any time in the past a legal domicil in one of these homes, that domicil must still continue. Where there are two actual and equal homes, the earlier in point of time is the legal domicile."

The foregoing quotation is directly in point on the facts of this case. It was adopted in part by the Special Master, at pages 55-6 of his Report. It points out that the summer home is the place where a person ordinarily gives vent to his exuberancy. Manifestly, Green could not operate a radio broadcasting station, maintain a photographic studio, enshrine a whale ship, or establish an aviation field in New York City. The logical place for him to give play to his inclinations in those respects was at his summer home where he had plenty of room to operate and which he occupied during those portions of the year when the weather was propitious. Far from establishing that Round Hills was the domicile, these activities tend to show that it was his playground where he found relief for his pent-up feelings.

In *Brisenden v. Chamberlain*, 53 Fed. 307, it was said (p. 311):

"The essential distinction between 'residence' and 'domicile' is this: The first involves the intent to leave when the purpose for which he has taken up his abode ceases; the other has no such intent,

the abiding is *animo manendi*. One may seek a place for purposes of pleasure, of business, or of health. If his intent be to remain it becomes his domicile; if his intent be to leave as soon as his purpose is accomplished, it is residence. Perhaps the most satisfactory definition is that one is a resident of a place from which his departure is indefinite as to time, definite as to purpose; and for this purpose he has made the place his temporary home."

Whenever Green went to Round Hills, he went there with the definite intention of remaining only for a period of a few months and of leaving at the end of that period. The same is true with respect to Florida. New York was the only home he acquired with intention of remaining permanently or for an indefinite time, and he continued to maintain this home as long as he lived.

In *Kennan on Residence and Domicile*, it was said (p. 33):

"Domicile is a much broader term than residence. A man may have his domicile in one state and actually reside in another, or in a foreign country. If he has once had a residence in a particular place and removed to another, but with the intention of returning after a certain time, however long that may be, his domicile is at the former residence and his residence at the place of his temporary habitation."

In *Plymouth v. Kingston*, 289 Mass. 57, it was said (p. 60):

"Absence from an established domicil for a particular purpose does not change domicil if residence in a new location is not accompanied with a fixed purpose to remain there indefinitely and with an intention not to return to reside in the former

home which is abandoned, *Wilbraham v. Ludlow*, 99 Mass. 587."

In *Wagner v. Scurlock*, 166 Md. 284, it was said (pp. 292-3):

"When one takes up a new residence, in order to avail himself of the rights which such change of domicile confers, it must be not so much with the intention of there remaining, but of the abandonment of his former domicile as a place of residence, and 'excludes any definite intention to return to the place of the previous domicile. 19 *C. J.* 407; *In re. Titterington*, 130 Iowa, 356, 358, 106 N. W. 761; *Walker v. Walker*, 125 Md. 649, 665, 94 A. 346."

The length of residence in a given place is treated in *Greene v. Greene*, 11 Pick. 410, where it was said (p. 415):

"He resided there, it is true, during the larger portion of each year; but when there is a divided residence the length of residence in the one place, or the other, will not settle the question of domicile; but it must be determined by other circumstances."

In *City of Hartford v. Champion*, 58 Conn. 268, it was said (pp. 275-6):

"When once it is ascertained what is necessary to constitute one's domicil in any place, it is easy to point out what must be done in order to effect a change of that person's domicil to another place. All the conditions which are required to constitute the domicil in the given place must be transferred to the new place. When this is done the domicil is changed; and until this is done the domicil is not changed. The old one is not abandoned, the new one is not acquired. This, of course, excludes the existence of an intention to return to the former place; for the existence of an intention to return is

inconsistent with the idea that the former home is abandoned. *Clinton v. Westbrook,* 38 Conn., 12; *Sears v. Boston,* 1 Met., 250; *Greene v. Windham,* 13 Maine, 225; *Wilbraham v. Ludlow,* 99 Mass., 578. It was essential to the defendant's case that she should prove a residence in Springfield or in Suffield so permanent as to exclude the existence of an intention to make a domicil elsewhere, and so permanent as to exclude an existing intention to return to Hartford. If she had not done this she had not shown any domicil in either of those towns. If she had not done this she had not shown any abandonment of her domicil in Hartford, and her stay in Springfield or in Suffield was but a mere temporary sojourn there, and not a domicil at all."

In the case at bar, it is essential to Massachusetts' case to prove a residence in that State, or to Florida's case to prove a residence in that State, in either instance so permanent as to exclude the existence of an intention to make a domicile elsewhere and so permanent as to exclude an existing intention to return to New York. Unless this has been done, it has not been shown that Green was domiciled in either of those States, and no abandonment has been shown of the domicile in New York, his stays in Massachusetts and Florida being merely temporary sojourns there.

For the sake of argument, it may be conceded that Green had a potential domicile in either Massachusetts or Florida which could have blossomed into a domicile in fact if he had ever formed the requisite intention. If he had voted in Massachusetts, filed an income tax return there, removed his business affairs there, kept his principal bank accounts there, kept his securities and safe deposit vaults there, maintained his office there, declared his intention to be a resident there, run

for office there, or there had been a sufficient combination of these facts, he would have become domiciled there. If he had given like evidence of his intention to make Florida his domicile, he would have become domiciled there. The fact is that he never indicated his intention to become domiciled in either Massachusetts or Florida, and the domicile which he had acquired in New York persisted until he died.

A point has been made by the Special Master of the fact that Green expressed the hope that he should be at Round Hills when he died (R. 42). This expression was made in the year 1924. Evidently he changed his mind because in 1934 he told S. J. Tucker of West Palm Beach, Florida, formerly of Dallas, Texas, that Florida was his home and he expected to live there the rest of his days (D. 372). It is difficult to see how these conflicting casual statements can have any weight in determining Green's domicile.

In *Matter of Newcomb*, 192 N. Y. 238, *supra*, Mrs. Newcomb had expressed the desire to die in New York and be buried in Greenwood Cemetery, but her domicile at the time of her death was found to be in New Orleans, Louisiana.

Another case, the facts of which are very close to the facts of the case at bar, and which is strong authority for the proposition that Green died domiciled in New York is *Matter of Lydig*, 191 App. Div. 117, *supra*. The decedent, David Lydig, died October 24, 1917, at Lenox, Massachusetts, and was buried there He was born in New York City, May 19, 1841, where the families on both his father's and mother's sides had long been

prominent, and, during his entire life, he maintained a place of residence in New York City. He was conceded to have been domiciled in New York City until about 1900. From 1895 on, he occupied his New York dwelling for six or eight months during the year and spent the summer months at Lenox. In 1899, his wife erected and fully furnished a house at Lenox, costing $50,000. or $60,000. Thereafter, the New York house would be left in the possession of a caretaker, and the servants and household removed to Lenox, generally in the month of June, returning to New York about November first. In 1900, Lydig registered as a voter in Lenox and his name remained on the voting list there until his death. He voted there in 1912, but there was no record of prior or subsequent voting. From 1912 until his death, he was assessed for personal and poll taxes in Lenox. He paid no taxes on personal property in New York. The largest assessment against him for personal property at Lenox was $23,000., although he had a personal estate of over $300,000. In his will, executed in 1912, and a codicil, executed in 1913, he described himself as of Lenox, although both instruments were executed in New York City. He attended St. Mark's Church in New York City and was a member of its vestry. His clubs were New York City clubs. He kept his securities in New York City. All the real estate owned by him was in New York City, except an undivided interest in a parcel at Lenox. In his federal income tax returns filed in New York City for 1914 to 1917, inclusive, he described himself as residing in New York City. In 1917 he did not file an income tax return in Massachusetts, as required by a new law of that state. For the last 35 years of his life he was not engaged in business. The Court stated that

presumptively his New York domicile was retained and that the burden was upon Massachusetts, which had submitted itself to the jurisdiction of the New York courts, to show that such domicile was abandoned or changed. After reviewing the facts relied upon by Massachusetts, the Court say (p. 121):

> "These facts, taken together, tend to show a desire to have a domicile in Lenox but there must be more shown than desire and intent to change; there must be in fact a change of domicile."

The facts of the foregoing case were much stronger in favor of Massachusetts than are the facts of this case. The case shows the force of the presumption of the continuance of a domicile once established.

In re Pusey's Estate, 321 Pa. 248, it was said (p. 265):

> "It requires less evidence to prove the continuation of domicile than it does to establish a new domicile."

In *Matter of Harkness*, 183 App. Div. 396, the decedent, while domiciled in Greenwich, Connecticut, acquired a country estate in Kentucky, which in many respects resembled Green's country estate at Round Hills. He also had a winter home in California and a town house in New York City, the latter having been acquired subsequently to the Kentucky estate. Although it was held that Harkness eventually became domiciled in Kentucky, it was also held that his Greenwich domicile continued for several years after the Kentucky estate was acquired and until Greenwich was abandoned entirely as a residence.

In *Huntly v. Gaskell*, 1906 A. C. 56, *supra*, the decedent, Sir William Cunliffe Brooks, Baronet, was born in England, which was his domicile of origin. He had three residences, one at Manchester, where his business interests were, another in London, to which place he was called by virtue of his election to Parliament, and the third in Scotland. In his later years he gave up active participation in business at Manchester and spent most of his time in Scotland, where he had purchased a castle and estate. For the last thirty-one years of his life, his principal residence was at Glen Tana in Scotland, the time he spent in Manchester and London being only such as his parliamentary duties and business transactions required. During the last six years of his life his average residence in Manchester was thirteen days, in London forty-one days and at Glen Tana two hundred sixty-seven days. His domestic establishment was at Glen Tana and he built houses there for the families of some of his married servants. When he went to Manchester or London, he took such servants with him as seemed necessary for the occasion. The houses at those places were in charge of housekeepers and maids, but were kept ready for occupancy on a day's notice. He became extremely attached to Glen Tana and spent enormous sums of money there. In his later years his chief pleasure in life was in planning and superintending the construction of roads and the erection of buildings at Glen Tana. He had a bank account in Scotland for local purposes but his principal banking was done at Manchester. At his direction, he was buried at Glen Tana. Before his death, he had considered giving up his residences in England, but did not do so. In documents, he was described sometimes as of Glen Tana

and sometimes as of Manchester. He evidenced his desire to continue his English domicile and was advised by his attorney that it had not been changed. His family was at Glen Tana, his collection of furniture was there, and the family Bible and material correspondence were there.

In his opinion in this case, the Earl of Halsbury said (pp. 67-8):

> "* * * I should have thought that it was impossible to doubt that there were at least three residences which he had, about which it might have been equally said he made his home there. It does not follow that they were all three equally popular with him, or any one of three the main abiding place for the greater part of the year during which he lived in each of them in turn. But what is the inference to be derived from that? I should have thought that the obvious inference which anybody would draw would be that there was no intention to change his domicil. That he had three residences is true, but unless you can shew something else than the fact that a man of great wealth, who had three residences, preferred one rather than another, either in respect of sport at the earlier period of his career or in respect of the state of his health at a later part of his career clearly he found that Glen Tana agreed with him better and that the air was better, are you to infer, or is there any evidence from which you can infer, an intention to change his civil status? It seems to me that every part of his career points to the same conclusion. Being a very wealthy man, and doing whatever he liked to do, he might go to Antibes at one time with as much idea of change, in the sense of changing his status at Antibes, as at Glen Tana, but the real truth was that no change of any sort or kind is suggested by what he did. It is admitted that mere residence is in itself nothing. There may be continuous residence, or what I think has been appropriately

> suggested as being the most satisfactory word to use, 'settling' somewhere, which of course involves residence as part of it, and if it was suggested that a man had gone to settle at some particular place and had abandoned all other connection with all other country, I think that inference might be natural and just; but to suggest in the case of a man of great wealth, who is wandering from one place to another from time to time, although he may spend a larger part of his time in Scotland than elsewhere, that that of itself should be anything from which anybody could draw an inference that he meant to change his domicil, seems to me to be a very monstrous proposition."

The fact that the above case involved a question of domicile between England and Scotland is not sufficient to distinguish it. The relationship between these two British countries does not differ materially from the relationship which exists among the States of this country.

Cases holding that Green's absences from New York City for purposes of recreation and health did not have the effect of changing his domicile are numerous. The rule is stated in *Kennan on Residence and Domicile*, at page 259, as follows:

> "In general, changes of residence for consideration of health will not result in a change of domicile unless accompanied by a definite intention to abandon the former domicile and acquire a new one."

In *Dupuy v. Wurtz*, 53 N. Y. 556, *supra*, the decedent went to Europe in 1859 for the benefit of her health and remained there until she died, twelve years

later. Her physicians advised her throughout this period that she should not return to New York and in her latter years she became convinced that she could not return. Her dwelling house in New York City was closed up in 1859 and was not occupied until 1868, when she leased it, reserving one room for the storage of some of her effects. It was held that her New York domicile was never changed.

In *Walker v. Walker*, 1 Mo. App. 404, *supra*, it was said (p. 413):

> "There is a difference between a residence and a domicile, which, however, may not be capable of easy definition—that is to say, it may be difficult to define both terms in such manner as to escape criticism. But every one can see at least this distinction: A person domiciled here may, for the sake of his health, reside one or more years in some place the climate of which is supposed to be more favorable to his constitution. In such cases it would be harsh and unnatural to consider the person thus residing abroad to have forfeited his domicile here, or in any proper sense to have become a non-resident of Missouri, unless some intention, manifested by some act of abandoning his residence here, were shown. So long as a person previously domiciled and residing in Missouri does no act to indicate his intention to cease to be a resident of this State, and to remove elsewhere, much weight is due to the presumption that he continues to be a resident of Missouri, notwithstanding prolonged absences extending to the greater part of the year. If no such absences are shown, and no unequivocal act occur accompanied by a declaration of intention to change his residence, this presumption is not overcome."

In *Cruger v. Phelps*, 21 Misc. 252, the decedent spent many years in France because the climate there was

better suited to the health of his wife and daughter, but he was held not to have lost his domicile in New York City.

In *Brafman v. Brafman*, 144 Md. 413, *supra*, the decedent had been domiciled in Baltimore, Maryland, but for some years previous to his death spent the summer at Atlantic City and the winter in Georgia and Florida in order to benefit his health, although he spent short periods of time in Baltimore, where he lived at a small hotel or with relatives. His business interests were looked after in Baltimore by his brother and his securities and investments were principally kept in that city. He had an account in a Baltimore bank and other accounts in banks at Atlantic City and in the south. Decedent's declarations as to his residence were conflicting. It was held that the proof was insufficient to establish a change of domicile to Atlantic City, although he had married a few years prior to his death, and had lived at Atlantic City during the time he and his wife had cohabited.

See also:

Matter of Blythe, 166 Supp. 908;
Younger v. Spreckels, 12 Cal. App. 175, *supra*.

Conclusion.

A record of 9800 pages, 1592 exhibits (not 1484 as stated at page 6 of the Special Master's Report) and a Digest of 450 printed pages, all involving a great mass of detail and minutiae, should not confuse the issue. Stripped down to essentials, the facts stand out in bold relief.

Green abandoned his domicile in Texas in the year 1911.

When he abandoned his Texas domicile he acquired a new domicile in New York.

Although he subsequently acquired a summer residence in Massachusetts and a winter residence in Florida, he never became domiciled in either of those States *animo et facto.*

The law is well settled that a domicile once established continues until residence and intention unite to form a new one, and, as there was no such union of intention and residence, the New York domicile continued until Green's death.

POINT IV.

The exceptions filed on behalf of the respondent, The State of New York, should be sustained, the recommendation of the Special Master for a decree should be disapproved, and a decree should be entered that at the time of his death Edward Howland Robinson Green, in fact and in law, had his domicile within the State of New York.

Cost of Proceeding.

The order of this Court by which this proceeding was referred to the Special Master contains a provision that the allowance to him, the compensation paid to his

stenographic and clerical assistants, and the cost of printing his Report shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is respectfully submitted that the allowance to the Special Master, the items of expense herein, and the entire cost of the proceeding should be assessed against the Respondent, Hetty Sylvia Ann Howland Green Wilks. If the estate of Edward H. R. Green, deceased, were a party to this proceeding, it should, as a matter of equity, be required to pay the allowance and expenses, as the decedent by his actions during his lifetime created the situation which made this proceeding necessary and his estate was materially increased through tax avoidance (R. 21). The estate is not a party, but Mrs. Wilks is the sole beneficiary under her brother's will and an assessment against her will have the same effect as if the assessment were made against the estate.

Respectfully submitted,

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